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HAND-BOOK  
OF THE  
LAW OF BILLS AND NOTES

DESIGNED ESPECIALLY  
FOR THE USE OF INSTRUCTORS AND STUDENTS  
IN LAW SCHOOLS

BY  
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30414  
16/11/93.

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WEST PUBLISHING CO.  
1893



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To  
ADELBERT MOOT,  
*In recognition of his care and devotion  
to the interests of  
The Buffalo Law School,  
this book is inscribed.*

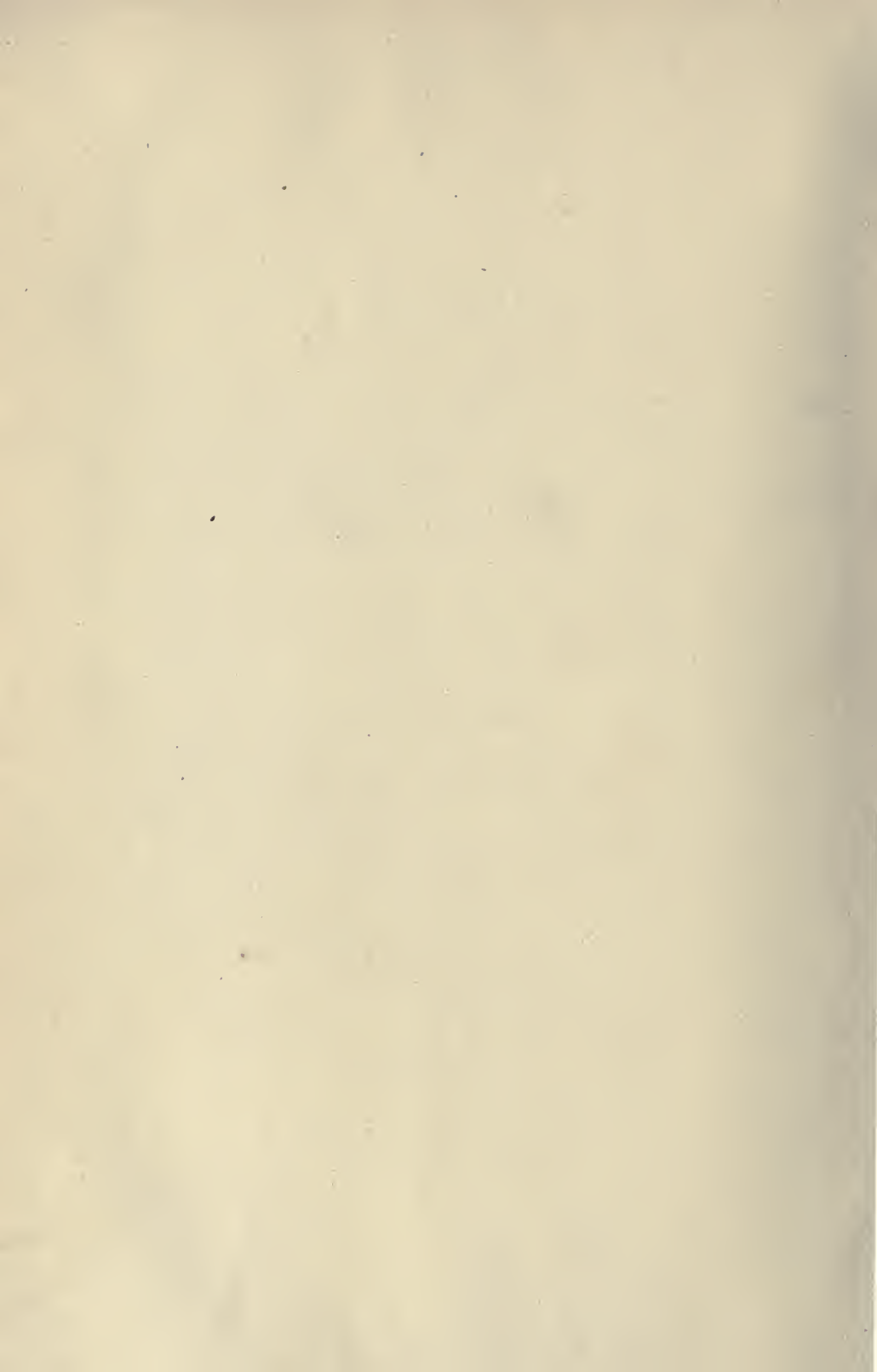


## PREFACE.

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THIS book is intended, not for the practitioner, but only for students in law schools and law offices. Its aim is to lay before the student those principles of negotiable bills and notes which will in the future most frequently come before him in his practice. With this end in view there have been collated from the best text-writers and the leading cases, the most apt statements of these principles. And since it is believed that no lawyer can advise a client upon principles of law unless he knows the practical business reasons that gave them birth in the minds of the judges, there are also stated in a brief way, the reasons which actuated the judges in arriving at the establishment of the principle itself. And lastly, that the student may see the operation of these principles and reasons in a practical light, there has been adapted from various sources for his drill, a statement of simple problems such as are likely to frequently arise in his practice, so that the instructor may drill the student, or the student may drill himself, in the application of the principles and reasons which the text of the book states. C. P. N.

BUFFALO, October 1st, 1893.





# TABLE OF CONTENTS.

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## CHAPTER I.

### OF NEGOTIABILITY SO FAR AS IT RELATES TO BILLS AND NOTES.

Section	Page
1. Purpose of Negotiable Paper.....	1
2-7. Distinction between Assignability and Negotiability.....	7
8-9. Indicia of Negotiability.....	14

## CHAPTER II.

### OF NEGOTIABLE BILLS AND NOTES, AND THEIR FORMAL AND ESSENTIAL REQUISITES.

10-12. Definition and Forms of Bills of Exchange.....	19
13. Original Parties to Bills of Exchange.....	22
14. Definition and Form of Note.....	22
15. Original Parties to Note .....	23
16. Subsequent Parties to Bill or Note .....	23
17. Essentials of Bill or Note.....	24
18. Order Contained in Bill .....	24
19. Promise Contained in Note... ..	27
20-26. Certainty as to the Terms of the Order or Promise.....	29
27-32. Payment of Money Only.....	38
33-42. Specification of Parties.....	42
43-45. Capacity of Parties.....	52
46-50. Delivery of Instruments.....	56
51-52. Date.....	59
53. Value Received.....	61
54. Days of Grace.....	62

### CHAPTER III.

#### ACCEPTANCE OF BILLS OF EXCHANGE.

Section	Page
55. Definition .....	70
56. Requisites of Acceptance.....	73
57. Varieties of Acceptance.....	73
58-60. Acceptance According to Tenor.....	74
61. Who may Accept.....	76
62. Delivery.....	78
63-64. Forms and Varieties of Acceptance.....	79
65. Implied Acceptance.....	82
66. Acceptance in Writing.....	83
67-68. Acceptance on Separate Paper....	83
69. Parol Acceptance of Future Bill.....	87
70-72. Acceptance for Honor or Supra Protest.....	88

### CHAPTER IV.

#### INDORSEMENT.

73. Definition.....	91
74. Place on Instrument.....	93
75. Allonge.....	94
76. Name of Holder.....	94
77. Form of Words.....	94
78. Delivery .....	94
79-81. Indorsement in Blank.....	94
82-83. Indorsement in Full....	98
84-88. Indorsement without Recourse, Conditional and Restrictive Indorsement.....	101
89. Nature of Indorsement.....	107
90-91. Requisites of Indorsement.....	110
92-93. Anomalous Indorsements.....	113

### CHAPTER V.

#### OF THE NATURE OF THE LIABILITIES OF THE PARTIES.

94-96. Acceptor and Maker.....	120
97. Facts Which Acceptor is Estopped to Deny....	122

## CONTENTS.

ix

Section	Page
98. Facts Which Acceptor Does not Admit. . . . .	127
99. Damages for Which Acceptor is Liable. . . . .	128
100. Damages for Breach of Promise to Accept. . . . .	128
101-104. Acceptor Supra Protest. . . . .	129
105-108. Drawer and Indorser. . . . .	132
109. Facts Which Drawer is Estopped to Deny. . . . .	135
110. Facts Which Indorser is Estopped to Deny. . . . .	137
111. Indorser without Recourse. . . . .	142
112-114. Breach of Warranties and Damages Therefor. . . . .	143
115-117. Accommodation Parties and Persons Accommodated . . .	145

## CHAPTER VI.

### TRANSFER.

118-119. Definition and Methods. . . . .	154
120-121. By Indorsement. . . . .	155
122-124. Instruments Payable to Bearer and Indorsements in Blank	158
125. By Operation of Law. . . . .	159
126. Overdue Paper. . . . .	160
127-128. Validity of Indorsement between Immediate Parties. . . .	164

## CHAPTER VII.

### DEFENSES COMMONLY INTERPOSED AGAINST A PURCHASER FOR VALUE WITHOUT NOTICE.

129-132. Real and Personal Defenses. . . . .	169
133-135. Usury. . . . .	173
136-139. Alteration of Instrument. . . . .	181
140. Material Alterations. . . . .	184
141. Fraud. . . . .	189
142. Duress. . . . .	192
143. Consideration. . . . .	195
144-145. Want or Failure of Consideration. . . . .	198
146. Illegal Consideration. . . . .	201
147. Lunacy or Drunkenness. . . . .	208

## CHAPTER VIII.

## THE PURCHASER FOR VALUE WITHOUT NOTICE.

Section	Page
148. What Constitutes.....	217
149-150. Antecedent Debt as Consideration.....	219
151. Bona Fides or Good Faith.....	225
152-155. Notice, Actual and Constructive.....	226
156-157. Time of Acquiring Notice.....	231
158. Purchaser with Notice from Bona Fide Holder.....	232
159. Purchase out of Usual Course of Business.....	233
160. Overdue Paper.. ..	234
161. Paper Payable at Sight or on Demand.....	235
162-163. Constructive Notice Presumed.....	236, 237
164-167. Presumption and Burden of Proof—Order of Proof.....	239
168-171. Summary of Position of Purchaser for Value without Notice.....	245

## CHAPTER IX.

## OF PRESENTMENT AND NOTICE OF DISHONOR.

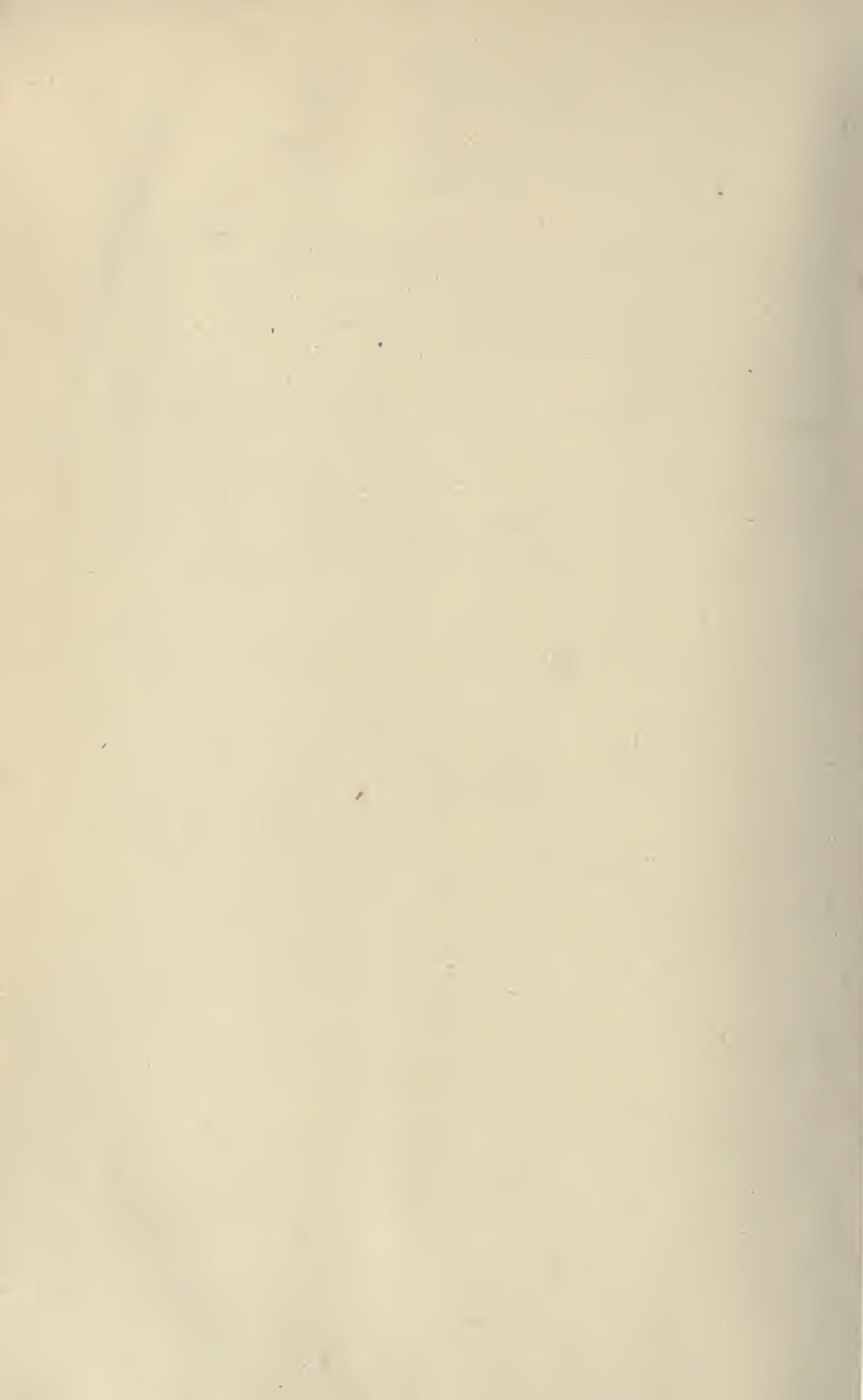
172. Presentment in General.....	249
173. Presentment for Acceptance.....	250
174-175. Manner of Presentment.....	253
176-177. Time of Presentment.....	255
178-179. Who may Make Presentment—Protest.....	257
180. Place of Presentment for Acceptance.....	261
181. Hour of Presentment.....	262
182-183. Effect of Non-Acceptance—Protest.....	263
184. Effect of Non-Presentment.....	265
185-186. Notice of Non-Acceptance.....	266
187-189. Place of Presentment for Payment.....	267
190. Time of Presentment for Payment.....	271
191. Effect of Non-Presentment for Payment.....	271
192. Definition of Notice of Dishonor .....	275
193. Elements of Notice....	276
194. Description of Instrument in Notice.....	277
195. Statement of Presentment, Demand, etc., in Notice....	279

# CONTENTS.

xi

Section	Page
196-197. By and to Whom Notice Given.....	283
198-200. To Whose Benefit Notice Inures .....	286
201-203. Method of Giving Notice.....	288
204-206. Time of Giving Notice.....	292
207-208. Waiver of Presentment and Notice.....	295

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# HAND-BOOK

OF

## NEGOTIABLE BILLS AND NOTES.

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### CHAPTER I.

#### OF NEGOTIABILITY SO FAR AS IT RELATES TO BILLS AND NOTES.

1. Purpose of Negotiable Paper.
- 2-7. Distinction between Assignability and Negotiability.
- 8-9. Indicia of Negotiability.

#### Purpose of Negotiable Paper.

1. These peculiar contracts (negotiable bills and notes) in some respects play the part of money in business affairs. They are used to transfer property or rights by means of individual or corporate credits. The fundamental purpose of negotiability is to endow them with all facilities necessary for a limited commercial medium.

#### ILLUSTRATION OF A NEGOTIABLE INSTRUMENT IN ITS USE AS A CIRCULATING MEDIUM.

*If A and B are in England, and C in Jamaica be indebted to A £1,000, and B be going to Jamaica, he may pay A this £1,000 and take a bill of exchange drawn by A in England upon C in*

*Jamaica. B, on his way to Jamaica, may be paid the £1,000 for the bill by D in New York, and indorse it to him; D may be paid for the bill £1,000 by E in Charleston, and indorse it to him; and E will collect the money of C, to whom it is presented for acceptance, in Jamaica, and who accepts it.*

The law, looking at bills of exchange and promissory notes as a circulating medium, divides them into two classes—negotiable instruments and non-negotiable instruments. Negotiability is not necessary to the form or substance of a promissory note or bill of exchange. The non-negotiable instrument, in its transfer, the law treats in most respects as an ordinary chose in action, and subject to the general rules touching assignments. For the negotiable instrument, on the other hand, in its most common form of the bill and note, it has endeavored to construct a system of rules, which shall protect persons who take it as a circulating medium.

Probably the primary object of this system is to give to negotiable bills or notes the effect which money, in the shape of government bills or notes, plays in commercial transactions. These are an unquestioned legal tender or medium of payment for debts, or for the transfer of property or rights. They are such an unquestioned medium because the credit or solvency of the government which has caused them to be issued is behind them. It is the distinct promise of a whole nation to exchange for the bill itself, in precious metal, a sum of money intrinsically worth the face of the bill. By the use of money as a circulating medium, commerce or the interchange of commodities between men is facilitated.

Bills and notes are to-day alike invested with the privileges of negotiability, but they derive it from a different origin. The historical source of the negotiability which



invests bills is the custom of merchants. Its source as to notes is the statute of 3 & 4 Anne, c. 9, §§ 1-3. The custom of merchants or the law merchant grew out of the usages of trade regulating the dealing of merchants, in the interchange of merchandise between commercial countries. One custom and usage after another grew up, the body of usages and customs expanded and developed, and became more and more settled, until a system of rules was created by which the courts at length were at least strongly influenced, and probably bound, in regulating the conduct of merchants, one to another. These rules were particularly pertinent to that especial instrument invented by merchants for the more easy remittance of money between commercial countries,—the bill of exchange; and the courts, in the first instance, allowed the peculiar facilities for transfer to be attached only to foreign, as distinguished from inland, bills of exchange. Inland bills they rejected from the operation of this body of rules. "I remember," said Chief Justice Holt, in *Buller v. Crips*,<sup>1</sup> "when actions upon inland bills of exchange did first begin; and there they laid a particular custom between London and Bristol, and it was an action against the acceptor. The defendant's counsel would put them to prove the custom, at which Hale, C. J., who tried it, laughed, and said they had a hopeful case of it. And in my Lord North's time it was said that the custom in that case was part of the common law of England, and these actions since became frequent, as the trade of the nation did increase, and all the difference between foreign bills and inland bills is that foreign bills must be protested before a public notary before the drawer can be charged, but inland bills need no protest. Notes," the learned judge continued, "are only an invention of the goldsmiths in Lombard street, who had

<sup>1</sup> *Buller v. Crips*, 6 Mod. 29.

a mind to make a law to bind all those that did deal with them; and, sure, to allow a note to carry any lien with it were to turn a piece of paper, which is in law but evidence of a parol contract, into a specialty. And, besides, it would empower one to assign that to another which he could not have himself, for, since he to whom this note was made could not have this action, how can his assignee have it? And these notes are not in the nature of bills of exchange, for the reason of the custom of bills of exchange is for the expedition of trade and its safety; and, likewise, it hinders the exportation of money out of the realm."

Thus, what Lord Holt called "the mighty ill consequences that it was pretended would ensue by obstructing the course of trade," was the reason for extending the rules for negotiability which protected foreign bills of exchange to inland bills of exchange; and they, in their turn, became entitled to be deemed negotiable. The English courts, however, could not be prevailed upon to further extend these privileges to notes; hence, in 1704, the very year in which Lord Holt pronounced his decision, the statute of Anne was enacted. The opening clause of this speaks for itself. It was: "Whereas, it hath been held that notes in writing, signed by the party who makes the same, whereby such party promises to pay unto any other person, or his order, any sum therein mentioned, are not assignable or indorsable over, within the custom of merchants, to any other person; and that the person to whom the sum of money mentioned in such note is payable cannot maintain an action by the custom of merchants, against the person who first made and signed the same; and that any person to whom such note shall be assigned, indorsed, or made payable could not, within the said custom of merchants, maintain any action upon such note against the person who first drew and signed the same: Therefore,

to the intent to encourage trade and commerce, which will be more advanced if such notes shall have the same effect as inland bills of exchange, and shall be negotiated in like manner, be it enacted," etc., that negotiable notes shall stand on the same footing as inland bills of exchange. Thus, the statute of Anne is the historical origin and creation of the theory of negotiability as attached to notes. Its principles have been followed and generally embodied in the statutes of the various states of the United States.

In the many cases which arise with reference to the negotiability of instruments in forms similar to notes, it is, after all, the important point to determine whether they were such as were within the purview of the statute of Anne, or of the statutes of the various states which have embodied the principles of the statute of Anne. The non-negotiable note followed the general rule of all contracts, which was that laid down in *Jackson v. Alexander*,<sup>2</sup> that the words "for value received," appearing on the face of an instrument, import a consideration. This was decided in 1808, in the case of a deed; and in 1811,<sup>3</sup> this doctrine was followed. It was held that the words "for value received" were sufficient to cast upon the defendant proof that there was no consideration; but, in the absence of such words, which were mere admissions against interest,<sup>4</sup> it was held that, a non-negotiable note being a special contract, the words "value received" not appearing, the special consideration of the note must be shown and proved. This early doctrine is, however, upset by the late case of *Carnwright v. Gray*,<sup>5</sup> which apparently holds, in the

<sup>2</sup>*Jackson v. Alexander*, 3 Johns. 483.

<sup>3</sup>*Jerome v. Whitney*, 7 Johns. 321.

<sup>4</sup>*Saxton v. Johnson*, (1813,) 10 Johns. 418.

<sup>5</sup>*Carnwright v. Gray*, 127 N. Y. 92, 27 N. E. Rep. 835, (decided in 1891.)

face of a great weight of authority, that non-negotiable, as well as negotiable, notes were within the statute of Anne. That case expressly decides only the fact that a note, whether negotiable or non-negotiable, is given *prima facie* for value. However broad its terms may be, the limits of that decision as to the other muniments of negotiability are not clear. It certainly cannot be meant to declare that the statute of Anne gives a non-negotiable note "the same effect as an inland bill of exchange, according to the customs of merchants."

Non-negotiable bills are, in general, mere assignments or orders. In *Atkinson v. Manks*,<sup>6</sup> a number of important distinctions are pointed out: A person suing the acceptor must show funds in the acceptor's hands to pay, for the agreement is not an acceptance, but a mere promise to pay, and must be based upon a sufficient consideration.<sup>7</sup> The acceptor cannot be sued upon his acceptance, i. e. upon the bill, but upon the promise to pay evidenced by the acceptance. The acceptor is under no general liability of the acceptor to pay the bill in the first instance. Non-negotiable bills are assignments in this sense. In *Morton v. Naylor*,<sup>8</sup> a direction to a tenant to pay rents as they became due was a direction to appropriate and hold them to the use of a third person. They are thus assigned to him, and this whether of the whole or part of the fund, and whether assented to or not, as long as the drawer had notice of it. In *Lowery v. Steward*,<sup>9</sup> such funds were to be treated as moneys or property held by the drawee for another.

There are some features non-negotiable bills and notes

<sup>6</sup> *Atkinson v. Manks*, 1 Cow. 691.

<sup>7</sup> *Id.* p. 707.

<sup>8</sup> *Morton v. Naylor*, 1 Hill, 583.

<sup>9</sup> *Lowery v. Steward*, 25 N. Y. 239, 243.



have in common. They can only be transferred by assignment, and not by indorsement. The fact of possession of either the bill or note is not evidence of title; so that its mere production upon a trial is not *prima facie* evidence of a right to recover.<sup>10</sup> And, lastly, title to either a non-negotiable bill or note is subject to every equity. The indorsee of a bill or note, in its terms not negotiable, may sue the indorser in his own name, but he can only sue the maker in the name of the original payee, except where special statute otherwise provides. The indorsee of paper not negotiable is only responsible to parties not immediate where he especially contracts to be so; and, lastly, an indorser of either cannot insist on demand and notice as a condition precedent.

### Distinction between Assignability and Negotiability.

2. **ASSIGNABILITY**—Pertains to contracts in general.

3. An assignment is the legal method of transferring the property or rights evidenced by the contract.

4. It is an impracticable method, as regards a circulating medium, because:

- (a) Title by assignment, as against the debtor, is not complete without notice to the debtor.

<sup>10</sup> *Barrick v. Austin*, 21 Barb. 241.

- (b) No subsequent purchaser of the property or right can acquire better title than that of his immediate assignor.
- (c) The assignee of a chose in action takes subject to all the equities of the person who made the assignment.
- (d) No one but the original assignor could bring suit, except
  - (1) In equity;
  - (2) As assignees in bankruptcy;
  - (3) As executors and administrators;
  - (4) Or in jurisdictions where this has been specially modified by statute.

5. **NEGOTIABILITY** — Pertains to a special class of contracts.

6. A negotiation is the legal method by which the title to the special contracts is transferred or rights under them created.

7. Negotiability facilitates their transfer as a circulating medium, because:

- (a) The bona fide possessor for value is presumed to be the true owner, and has good title.
- (b) The bona fide owner and holder for value may recover in his own name the full amount.
- (c) Transfer by negotiation is affected by indorsement or delivery.
- (d) In general, a consideration for the contractual relation is conclusively presumed as between parties not immediate.

It is the purpose of this note to state briefly the fundamental reasons why negotiable bills and notes could not readily be transferred as a circulating medium under the rules governing the transfer of ordinary choses in action. The rights evidenced or created by ordinary contractual obligations are almost always a kind of property, having in themselves a value measured in law by the damages assessable upon their breach. This property may at this stage of the law pass from person to person just as any other property does. But there are well-settled rules governing such transfer, which are the outgrowth and mingling of early doctrines of the courts of common law and of equity, and at which the student must glance to understand the rules themselves. To this must also be added the statement that statutes, from time to time, have been largely instrumental in moulding these doctrines of common law and of equity into the form which the theory of assignment of choses in action presents at the present time.

It was probably the common-law rule in the first instance that no assignee of the benefits of a contract could sue for and recover them, because the primitive view was that the contract created a strictly personal obligation between the creditor and the debtor. And whether from reasons of business expediency, or because they were influenced by equitable doctrines, is not clear, but the courts of common law at an early day modified this rule into the one that still prevails, namely, that an assignment of a contract might be made, but the assignee must sue for its benefit in the name of an assignor or his representatives. The theory was that the courts of common law will so far take cognizance of equitable rights created by the assignment that the name of the assignor may be used as a trustee of the benefits of the contract for the benefit of the assignee. This doctrine has been generally still further modified by statutes, the com-

monest ones being, in the United States, the provisions of the various Codes,—that “every action must be prosecuted by the real party in interest,” and that the “transfer of every claim or demand passes an interest which the transferee may enforce by an action in his own name, as the transferer might have done.” With courts of equity, it is true, the rule was different. For in equity, from immemorial times, the assignment of a chose in action or of the benefits under a contract has been permitted, and the assignee could maintain a suit in equity in his own name. But, however salutary the operation of this equitable rule might have been in some phases of the enforcement of contract rights, it could have had little influence with bills and notes. Cases arising upon them generally came within the cognizance of the courts of common law; and there are cases to show that even when the assigned non-negotiable promise was to pay a sum of money to the assigning promisee, or to bearer, or to order, or where, by any other form of words, the instrument was purported to be made assignable, even then the holder could not sue in his own name, but only in that of his assignor. This objection, inasmuch as it related only to the form of action, was not of much importance. But probably, were it the rule governing the transfer of negotiable instruments, it would clog their circulation, since it would complicate and render less certain the recovery of judgments upon them in the courts.

There were other rules relating to the transfer of ordinary contracts, governing alike courts of common law and equity, which were of greater practical importance. The first is the doctrine of notice. The rule, as stated in the text, is that title, as against the debtor, is not complete without notice to him. Naturally, as the result of this rule, follows the one that a debtor who performs his contract



to the original creditor, without notice of any assignment by the creditor to another person, is released from his obligation under it. Thus, in *Van Keuren v. Corkins*,<sup>11</sup> a bond and mortgage were given, which were assigned by various intermediate assignments, which were not recorded, until some nine years afterwards. At that time the mortgage was attempted to be foreclosed by the true owner. In the mean time the mortgagor had made various payments upon the mortgage, and finally had paid it up in full to the original mortgagee, some three years before the foreclosure. These payments, on the mortgagor's part, were made without notice or knowledge of the assignments. It was held that the mortgagor was to be protected, and would even have been protected if the assignments had been recorded, because notice must be given or brought home to the mortgagor not to pay the original mortgagee, else payments to such mortgagee on account of the mortgage are perfectly valid. This is the logical outgrowth of the theory of assignment, as is well explained in the English case of *Stocks v. Dobson*.<sup>12</sup> "The debtor," said the court, "is liable at law to the assignor of the debt, and at law must pay the assignor if the assignor sues in respect of it. If so, it follows that he may pay without suit. The payment of the debtor to the assignor discharges the debt at law. The assignee has no legal right, and can only sue in the assignor's name. How can he sue if the debt has been paid? \* \* \* The law, therefore, \* \* \* has required notice to be given to the debtor of the assignment, in order to perfect the title of the assignee."

There is another factor of assignments to be considered. It is true that the courts in many of the states at the pres-

<sup>11</sup> *Van Keuren v. Corkins*, 66 N. Y. 77.

<sup>12</sup> *Stocks v. Dobson*, 4 De Gex, M. & G. 15. .

ent day will decline to examine into the consideration of the assignment of an ordinary contract, holding that a payment of it by the debtor to the person who holds the rights under a valid assignment will release the debtor from his liability. But it was probably the common-law rule, and certainly the equity rule, that an assignment would not be supported unless consideration had been given by the assignee. This is probably the rule prevailing at present in many localities.

The rules in regard to negotiability are a sharp contrast in their effect to these principles governing assignments. The debtor is *prima facie* protected in payments upon negotiable bills and notes made to the person who has the instrument in his possession; hence the person having the instrument in his possession is, under most circumstances, presumed to own it, and to have a legal right to it. The rule of *caveat emptor* does not apply to instruments payable in money and to the bearer. A purchaser in good faith from one who has stolen them acquires a valid title.<sup>14</sup> If these rules were not so, every bank or merchant who took the instrument, and gave money or value for it, would be compelled to make inquiries, and also give notice of their ownership of the instrument to all prior parties, to prevent the instrument's being paid to some one else. Several results would inevitably flow from these conditions. Business men would decline to take such trouble. This friction would check the circulation of the bill or note, and destroy its effectiveness as a quasi money; and thus, so far as negotiable bills and notes could aid it, credit would no longer be as good as cash in the commercial markets of the world.

Perhaps the last and most important distinction made

<sup>14</sup> *Spooner v. Holmes*, 102 Mass. 503; *Birdsall v. Russell*, 29 N. Y. 220; *Evertson v. National Bank of Newport*, 66 N. Y. 14.

between the transfers of non-negotiable contracts and those of negotiable bills and notes is that the assignee takes subject to the equities or defenses existing between the prior parties, while the bona fide holder of a negotiable instrument may disregard these equities, and recover upon suit the full amount called for by the instrument he buys. According to the Honorable Theodore Dwight, in *Trustees v. Wheeler*,<sup>15</sup> the assignee takes subject, not only to the equities existing between the original parties, but also must always abide the case of the person from whom he buys. The holder of a chose in action cannot alienate anything but the beneficial interest he possesses. It is a question of power or capacity to transfer to another, and that capacity is to be exactly measured by his own rights. This is undoubtedly the law in England and in New York, though in many of the states of the Union the great authority of Chief Justice Kent has prevailed to limit the equities to those existing between the original parties, and does not extend them to those existing in favor of third parties. The technical or theoretical reason of the rule is that given by Judge Story in his *Equity Jurisprudence*:<sup>16</sup> "Every assignment of a chose in action is considered in equity as in its nature amounting to a declaration of trust and to an agreement to permit the assignee to make use of the name of the assignor in order to recover the debt, or to reduce the property into possession." This theory leads to the conclusion that the action by the assignee must be precisely commensurate with that of the assignor, as it must be in his own name, and on the supposition that, for the purposes of the action, he is still the owner.

<sup>15</sup> *Trustees of Union College v. Wheeler*, 61 N. Y. 88.

<sup>16</sup> Story, *Eq. Jur.* § 1040.

### Indicia of Negotiability.

8. The instrument must contain express words of negotiability, although there is no set form of such expression. It is enough if the intention of the parties to make it negotiable can be fairly construed from the terms of the contract.

9. The usual form of making an instrument negotiable is making it payable either

(a) To order, or

(b) To bearer.

It is the purpose of this note to explain what form of words, when they occur in an order or promise to pay money, make that order or promise a negotiable one; or, in other words, what are the indicia of negotiability? As has been said, negotiability is the peculiar theory of the law merchant, and the law merchant has as its sources the enactments of statutes and the decisions of judges, based upon the theories of equity and reason of commercial expediency.

The first question, then, is, what indicia do the statutes declare confer negotiability upon orders or promises to pay money? The statute of Anne declares that "all notes \* \* \* whereby one \* \* \* doth promise to pay to any other person, \* \* \* his order, \* \* \* or unto bearer, \* \* \* shall be assignable or indorsable over \* \* \* as inland bills of exchange, \* \* \* according to the custom of merchants." The New York statute declares that "all notes in writing \* \* \* whereby the maker promises to pay to any other person, or his order, or to the order of any other person, or unto bearer, \* \* \* shall have the same effect and be negotiable in like manner, as inland bills of exchange, according to the custom of merchants." This



is almost the form of the statute of Anne, it will be noted. So in very many states the statute of Anne, or one quite similar to it, has been enacted. In some states, in addition to the foregoing phrases, peculiar phrases appear to be essential to negotiability. Thus, in Arkansas, the words "without defalcation" must be used; in Missouri, "for value received" must be used in a note, but not in a bill; in Alabama, notes, but not bills, payable at a bank, are negotiable; in Georgia, a similar statutory rule prevails; and in other states the statutes have prescribed certain phrases which, other things being equal, if present in promises to pay money, necessarily make them negotiable promissory notes. Thus, to determine whether notes contain the qualities of negotiability which we described in the last note, we may first turn to the statute; and, if there appear upon the face of the instruments the phrases authorized by the statute, then, other things being equal, the notes are certainly negotiable. As may be seen, too, on page 102, post, except, in the case of a restrictive indorsement, a contract once stamped by the original parties with the character of negotiability in most cases cannot be deprived of this characteristic by the subsequent agreement or conduct of the parties.

While it is unquestioned that bills and notes, correct in other respects, drawn in the words of the statutes, are negotiable, the question arises, are they the only forms of words which will confer negotiability? Some express words of negotiability are necessary to confer this quality.

In *Maule v. Crawford*,<sup>17</sup> "8 months after date, we promise to pay G. H. \$275, for value received," was held not a negotiable note, because the statute directed words of negotiability. In *Douglass v. Wilkeson*,<sup>18</sup> the theory is fully ex-

<sup>17</sup> *Maule v. Crawford*, 14 Hun, 193.

<sup>18</sup> *Douglass v. Wilkeson*, 6 Wend. 638.

pounded. There the indorsement was: "Mr. Olcott: Pay, on the within, \$750. [Signed] S. Wilkeson." The note was made by Heman Norton for \$2,500, payable 90 days after date, at the Mechanics' & Farmers' Bank, to the order of defendant. It was questioned whether this was a proper indorsement. The court pointed out that the contract the maker made with the payee was "to pay him, or such person as he or his indorsee or any indorser's indorsee should direct;" and hence there was as much privity between the last indorsee and the drawer, and between him and the precedent indorsers, as there was between the drawer and the payee. The indorsement is an incident and part of the original contract. The indorsee holds the notes, if not with precisely the same privileges, rights, and advantages as the original payee, with nearly the same against the maker.

What words will then be deemed by the courts to confer negotiability? "Whether the parties to an instrument can give it a negotiable character, with all the incidents pertaining to negotiable paper, when it is not in terms within the class of instruments known to the law as 'negotiable,' may be questioned," says Allen, J., in *Evertson v. Bank*.<sup>19</sup> But, however this may be with instruments intended to be otherwise than orders or promises for the payment of money alone, still it is probably the rule that, in the instruments governed by the rules of the law merchant, any words in a bill or note from whence it can be inferred that the person making it, or any other party to it, intended it to be negotiable, will give it a transferable quality against that person.<sup>20</sup> This is probably the better rule, although it was the

<sup>19</sup> *Evertson v. National Bank of Newport*, 66 N. Y. 18. See, also, *Crouch v. Credit Foncier of England*, L. R. 8 Q. B. 374.

<sup>20</sup> *U. S. v. White*, 2 Hill, 59.

former English rule that, unless a bill or note be payable to order or to bearer, it was not negotiable.<sup>21</sup> The interest of the parties should, and probably would, override the form of words,<sup>22</sup> and if the court can determine from the words used that, as a matter of fact, it was the intention of both of the parties, the one to assume the rights of a holder of a negotiable instrument, and the other to incur the liabilities of a party thereon, and the instrument in other essential respects contains the elements of a negotiable bill or note, the instrument would probably be treated as negotiable although formally incorrect.

### PROBLEMS.

(1) "Thirty days after date I promise to pay X \$50.00." (Signed) Y. Is this note negotiable? How would you transfer it?

(2) "Due A, or bearer." (Signed) B. If this note were in the possession of C without proof of assignment or indorsement, could you safely pay it to him?

(3) X makes a note in form "Pay C \$100.00." (Signed) X,—and indorses it to D. Upon D suing X, X objects that there is no proof of assignment. Is this a defense?

(4) "Pay to the bearer, C." Is this a negotiable draft?

(5) "Pay to C, or order," or "Pay to the order of C." Do these constitute negotiable drafts?

(6) A writes to B, his tenant, to pay to C the quarterly rents as they may become due for the coming year. B accepts the order. What rights has C upon this instrument?

(7) Is the foregoing example 1 a good contract as a promise to pay money? What is the effect of omitting the words "or order" from a promise or direction to pay money as regards its validity?

<sup>21</sup> Byles, Bills, p. 85; *Smith v. Kendall*, 6 Term R. 123, 1 Esp. 231.

<sup>22</sup> *McClelland v. Norfolk South. R. Co.*, 110 N. Y. 469, 18 N. E. Rep. 237.

(8) "Due B \$325.00, payable on demand." (Signed) X. Can B by a written assignment transfer this to C, so that he may recover upon the promise to pay contained in it against X?

(9) "I promise to pay to the order of the person who shall hereafter indorse this note." (Signed) B. Can this instrument be transferred by indorsement?

(10) State in what respects an assignment differs in form from an indorsement.



## CHAPTER II.

### OF NEGOTIABLE BILLS AND NOTES, AND THEIR FORMAL AND ESSENTIAL REQUISITES.

- 10-12. Definition and Forms of Bills of Exchange.
- 13. Original Parties to Bills of Exchange.
- 14. Definition and Form of Note.
- 15. Original Parties to Note.
- 16. Subsequent Parties to Bill or Note.
- 17. Essentials of Bill or Note.
- 18. Order Contained in Bill.
- 19. Promise Contained in Note.
- 20-26. Certainty as to the Terms of the Order or Promise.
- 27-32. Payment of Money Only.
- 33-42. Specification of Parties.
- 43-45. Capacity of Parties.
- 46-50. Delivery of Instruments.
- 51-52. Date.
- 53. Value Received.
- 54. Days of Grace.

#### Definition and Forms of Bills of Exchange.

10. A bill of exchange is commonly defined as an unconditional order in writing for the payment of a sum of money absolutely and at all events.

11. Bills are of two kinds:

FOREIGN—Of which the following is a common form:

Buffalo, N. Y., U. S. A., June 15, 1891.

*First.* Exchange for London

£500

Thirty days after sight of this First of Exchange (Second and Third Unpaid) pay to the order of JOHN SMITH Five Hundred Pounds Sterling, value received, and charge the same to account of  
THOMAS ROBINSON.

To Baring Bros. & Co.,

London, Eng.

ACCEPTED.

Baring Bros. & Co.

Buffalo, N. Y., U. S. A., June 15, 1891.

*Second.* Exchange for London.

£500

Thirty days after sight of this Second of Exchange (First and Third Unpaid) pay to the order of JOHN SMITH Five Hundred Pounds Sterling, value received, and charge the same to account of  
THOMAS ROBINSON.

To Baring Bros. & Co.,

London, Eng.

Buffalo, N. Y., U. S. A., June 15, 1891.

*Third.* Exchange for London.

£500

Thirty days after sight of this Third of Exchange (First and Second Unpaid) pay to the order of JOHN SMITH Five Hundred Pounds Sterling, value received, and charge the same to account of  
THOMAS ROBINSON.

To Baring Bros. & Co.,

London, Eng.

Note—The common business name for a bill of exchange is a draft.  
A bill of exchange is a draft.

Note—The states of the Union are foreign states as regards each other.

**12. INLAND—Of which the following is a usual form:**

\$500.00.

Thirty days after sight pay to the order of JOHN SMITH Five Hundred Dollars, value received, and charge to account of

THOMAS ROBINSON.

To Baring Bros. & Co.,

New York City.

ACCEPTED.

Baring Bros. & Co.

Buffalo, June 15, 1891.

Under the English law, bills drawn or payable, or both, abroad, or, until quite recent times, drawn in England and payable in Scotland or Ireland, or vice versa, were foreign bills. Bills both drawn and payable either in England or Wales were inland bills. In the United States the general rule is that a bill drawn in one state and payable in another is a foreign bill;<sup>1</sup> the idea being in the United States that the several states, retaining in themselves the power to make local business regulations and laws, are thus far separate and independent sovereignties, and to be thus viewed in the decision of points involved in the law merchant. Aside from these local regulations, the principal difference in the United States between the foreign and inland draft is that the former on dishonor requires protest by a notary public; the latter does not. In the case of international foreign bills a further usage of long standing has existed, arising from the difficulty of communication in former times between different nations and the danger of loss in travel. It is to draw the bill in a set of three or four parts, each counterparts of the other, except that in each part of the set was incorporated a condition that that particular bill should only be payable provided all the others remained unpaid. This condition operates as a notice to the acceptor to accept and pay but one bill, and he and the drawer are liable upon but one bill; for it is well-settled law that a payment of one of a set operates as a discharge of the rest. The whole set collectively is deemed to amount to but one

<sup>1</sup> Halliday v. McDougall, 20 Wend. 81, s. c. 22 Wend. 264; Commercial Bank v. Varnum, 49 N. Y. 269; Dickens v. Beal, 10 Pet. 572; Bank of U. S. v. Daniel, 12 Pet. 32; Phoenix Bank v. Hussey, 12 Pick. 483.

bill.<sup>2</sup> The rule that a payee or subsequent indorser, who indorses two or more parts of a bill to separate indorsees, is liable on indorsement to each separate indorsee, operates as a check to the improper circulation of the bill. The transferrer is bound to pass over upon transfer all parts of the bill in his possession, and thus the circulation of these instruments may be effected with safety.

### Original Parties to Bills of Exchange.

13. The parties to the foregoing bill are technically termed:

- (a) **DRAWER**—The party who orders the payment of the money in the bill; e. g. (Thomas Robinson.)
- (b) **DRAWEE**—The party to whom the order is directed; e. g. (Baring Bros.)
- (c) **ACCEPTOR**—The drawee who assents to the foregoing order, and thus becomes principal debtor on the bill; e. g. (Baring Bros.)
- (d) **PAYEE**—The party in whose favor the order is made; e. g. (John Smith.)

### Definition and Form of Note.

14. A promissory note is commonly defined as an unconditional written promise, signed by the maker, to pay absolutely and at all events a sum certain in money, either to the bearer or to a person therein designated or to his order.

<sup>2</sup> 3 Kent, Comm. 109; Wells v. Whitehead, 15 Wend. 527; Durkin v. Cranston, 7 Johns. 442.



A common form is :

New  
York.

\$500.00.

Buffalo, June 15, 1891.

Thirty days after date I promise to pay to the order of JOHN  
SMITH Five Hundred Dollars, value received, at Bank of  
Buffalo. THOMAS ROBINSON.

### Original Parties to Note.

15. The parties to the foregoing note are technically termed :

- (a) **MAKER**—The person who signs the note and makes the promise ; e. g. (Thomas Robinson.)
- (b) **PAYEE**—The person in whose favor the promise contained in the note is made ; e. g. (John Smith.)

### Subsequent Parties to Bill or Note.

16. The foregoing are parties to the bill or note in its origin. There are also subsequent parties. They are :

- (a) **HOLDER**—The person having legal possession of the instrument, who, when it is negotiable under the law merchant, may recover the amount of same. This term includes payee, indorsee, or bearer.
- (b) **INDORSER**—One who directs the amount of the bill or note to be paid to a person in the indorsement named, or to his order, or to bearer.
- (c) **INDORSEE**—One who makes title to the instrument through the order specified in the last foregoing.



### Essentials of Bill or Note.

17. To be a negotiable bill of exchange or promissory note, the instrument must have the following essential characteristics:

- (a) The bill must contain an order.
- (b) The note must contain a promise.
- (c) The order or promise must be unconditional.
- (d) It must be an absolute promise for the payment of money alone.
- (e) The amount of money and its time of payment must be certain.
- (f) The instrument must be specific as to all its parties.
- (g) The instrument must be delivered.

### Order Contained in Bill.

18. **ORDER**—Means any form of words implying a right on the part of the drawer to demand payment of the money specified in the draft, and a corresponding duty to pay on the part of the person on whom demand is made.

The purpose of this note is to illustrate the difference between a mandatory form of words directing some one to pay money which he owes, or is due, and which can be circulated as a negotiable instrument, and a mere request for a loan, which can have no value in the commercial market. The distinction sought to be maintained is that between a direction or command and a request. The theory is that the drawer has funds in the hands of the drawee,

which he orders or directs to be delivered or paid over to the payee or indorsee of the bill. Hence, where the instrument is so written as to show that the drawer has no right to order the money paid, it is not a bill of exchange.<sup>3</sup> To determine this is, of course, a question purely of the construction of the instrument. That question is: Do the terms of the instrument, on the one hand, leave compliance or refusal optional; or do they, on the other hand, amount to an imperative direction? In the former case it is a mere request for a loan to be given some one else; in the latter it is a demand, with which the drawee must in common honesty comply, and amounts to the order which is a necessary constituent of a bill of exchange.

We may perhaps make this distinction more clear if we show it as it is laid down in the cases. The leading ones on the point which illustrate the distinction are *Ruff v. Webb*<sup>4</sup> and *Little v. Slackford*.<sup>5</sup> In *Little v. Slackford* Lord Tenterden said: "The fair meaning of the words, 'Please to let the bearer have seven pounds, and place it to my account, and you will oblige your humble servant, R. Slackford,'—was: 'You will oblige me by doing it.'" In *Ruff v. Webb* the words were: "Mr. B will much oblige Mr. A by paying C or order." In this case the instrument was construed in the light of surrounding facts, for C was A's servant, and on his discharge received the instrument in question, directed to B, who was (so it was given in evidence) A's banker, and A paid all his bills by giving instruments of this kind on B, which B paid when presented. C knew this. Lord Kenyon said it was a bill of exchange, because it was an order to pay money. In other words, in

<sup>3</sup> Edw. Bills & N. § 187; Chit. Bills, p. 154.

<sup>4</sup> *Ruff v. Webb*, 1 Esp. 129, (before Lord Kenyon in 1794.)

<sup>5</sup> *Little v. Slackford*, Moody & M. 171, (before Tenterden, C. J., in 1828.)

the latter case it was an order to pay money, because the payment of the instrument was obligatory upon B, who, in common honesty, was bound to pay it; in the former, it was a mere favor, because there was no duty resting upon the person to whom the instrument was addressed. He owed the signer nothing. Nor does the fact that the order is expressed in polite words impair its obligatory form. They may seem a request, yet be in fact an order. Indeed, the presumption is against their being a request. The courts generally seek to construe the instrument as an order. Judge Story<sup>6</sup> says, in effect, that language of mere civility cannot of itself change the nature of the instrument; and, in order to displace the construction that the instrument is a bill, it would seem to require that the language necessarily imported a favor, and was not meant as mere words of civility. This doctrine has been followed in the latter cases. "Please pay" is a valid order, the word "please" being simply a form of civility,<sup>7</sup> and it clearly appears in *New York, in Hoyt v. Lynch*,<sup>8</sup> where the following was pronounced to be a bill of exchange:

"New York., Dec. 16, 1847.

"Smith & Woglom to C. H. Hoyt, Dr.

"To Roofing Material.....\$300.00

"Mr. Lynch:

"Please pay the above bill, and charge same to our account, and oblige  
SMITH & WOGLOM."

On the other hand, as instances of instruments importing requests, we may refer to *Hamilton v. Spottiswoode*,<sup>9</sup> where

<sup>6</sup> Story, Bills & N. § 33.

<sup>7</sup> *Wheatley v. Strobe*, 12 Cal. 92; *Spurgin v. McPheeters*, 42 Ind. 527.

<sup>8</sup> *Hoyt v. Lynch*, 2 Sandf. 328.

<sup>9</sup> *Hamilton v. Spottiswoode*, 4 Exch. 200.

the words were: "We authorize you to pay C or order." Here Baron Parke said: "Here is only an option to pay or not; therefore this document is only a warranty in case the defendant paid, and not a bill of exchange." And in *Russell v. Powell*,<sup>10</sup> where J M assigned to the plaintiff a share in the estate of T H, deceased, in the following instrument: "To the executors of T H, deceased—Gents: We do hereby authorize and require you to pay to Mr. Geo. Powell, or his order, £250, being the amount directed by an order of court to be paid to our order. J M,"—it was pointed out that the executors need or need not pay this sum, according to the condition of the estate in their hands, and therefore this was not a bill of exchange.

### Promise Contained in Note.

**19. A PROMISE—**Means any form of words from which an intent of the maker to pay can be construed.

It is the purpose of this note to show that a mere admission that a debt is due, which can be treated on a trial only as so much proof tending to establish a debt, is a very different thing from the promise required for a negotiable promissory note. A promissory note is a new obligation, and not simply evidence of an old obligation. An acknowledgment of indebtedness is evidence of an old obligation, but creates no new obligation. In such terms as "Due C, \$100, value received;" "I O U \$100;" "I acknowledge the within note to be just and due,"—there is no liability that is new, assumed by the persons who signed these instruments. They are mere memoranda relating to a finan-

<sup>10</sup> *Russell v. Powell*, 14 Mees. & W. 418.



cial transaction, without any implication in words of a promise to pay.

But the courts go to the extreme limit to support a note in finding a promise to pay. Thus, in the words, "I do acknowledge myself to be indebted to A in £50, to be paid on demand," the words "to be paid" were deemed a promise to pay; and the words, "I O U, to be paid on the 20th inst.," were held a promissory note for a similar reason. So the words "John Mason, 14th Feb., 1836, borrowed of Mary, his sister, the sum of £14 in cash, as per loan, in promise of payment of which I am truly thankful for," were held to constitute a promise, because they expressly stated an advance of a loan of money, which the court thought was impliedly undertaken to be paid for. The expressions of gratitude were in this case treated as mere redundancy. In the expression, "Good to C or order," the words of negotiability amounted to a promise to be good not only to C, but also to whom he might direct; hence a general promise. So, also, the expression, "Due A, on demand," because the words "on demand" can only be of meaning with the words "to be paid" inserted. In Arkansas and Illinois and some of the western states there are, it is true, decisions holding that the word "due" imports such a promise; and in some jurisdictions other than these a duebill is also treated as a promissory note.<sup>11</sup> But this is against the weight of authority, and doubtful law. The true question before the court in construction should be: Can the intention of the signer be gathered from any form of words in the instrument itself to assume and pay as a distinctly new obligation?

<sup>11</sup> *Cummings v. Freeman*, 2 Humph. 143; *Finney v. Shirley*, 7 Mo. 42; *McGowen v. West*, Id. 569; *Harrow v. Dugan*, 6 Dana, 341; *Marrigan v. Page*, 4 Humph. 247.



A consideration of the decisions from which the foregoing instances are taken will clearly outline the theory that I O U's or acknowledgments cannot be made the foundations of so-called "commercial instruments." They can only be classified in law as admissions against interest, and have only weight as evidence. In order to entitle the instrument to be ranked as a negotiable, or even as a non-negotiable promissory note, it must be in itself a distinctly transferable contract right or a promise to pay. The admission of indebtedness could, even if construed to its utmost effect, be only treated as a right which was open to every defense or set-off; and hence, from their very nature, evidences of indebtedness could not be negotiable.

### **Certainty as to the Terms of the Order or Promise.**

**20. A negotiable bill or note must not be payable upon a contingency.**

- EXCEPTIONS—**(a) The negotiable instrument is subject to the implied conditions of presentment, protest, and notice of dishonor.
- (b) In certain jurisdictions it is held that if the event is certain to happen, but uncertain only in regard to time, the instrument is negotiable.

**21. The instrument must be an absolute promise for the payment of money alone.**

**22. The instrument must not be payable out of any particular fund.**

- DISTINCTION—**(a) Indicating to a drawee a source or fund where he may be reimbursed is not charging payment upon a particular fund.

- (b) A statement of the object for which instrument was drawn is not charging the payment upon a particular fund.

23. A negotiable instrument may contain an additional condition or agreement, which is not of the essence of the promise, but rather an incident or addition to it.

24. A negotiable instrument may give the holder an option between payment of money and some other thing.

25. The following are absolute promises to pay money, and are negotiable instruments:

Instruments payable

(a) On demand.

(b) At sight.

(c) A bill in which no time is expressed, which is equivalent to a bill on demand.

(d) A fixed period after sight.

26. An instrument payable in installments, even though it provides that upon non-payment of an installment the whole becomes due, is a negotiable instrument.

It is the purpose of this note to explain why a negotiable instrument cannot be conditional in its terms, and why it must be absolute upon its face, and founded upon the entire credit of the parties.

Generally speaking, certainty is one of the first essentials to a circulating medium. If conditions written upon the face of negotiable instruments were to be permitted, then every holder who discounted them would necessarily be charged with notice of the facts on the face of the in-

strument. And to be in a position to assert his equities every holder would further be bound to show that he had used all diligence to ascertain whether the condition had been fulfilled, or the event had happened. This would as much necessitate every holder procuring a written estoppel or transfer as it does necessitate it now when a person buys a mortgage; and, the very essence of business paper being the short terms of credit, to allow such an ingredient in the theory of negotiability would be an absurdity.

In the leading case of *Gibson v. Minet*,<sup>12</sup> the theory is explained thus: "The title of a bearer is self-evident. The title of an indorsee appears by the indorsement itself. Everything which is necessary to be known in order that it may be seen whether a writing is a bill of exchange, and as such, by the custom of merchants, partakes of the nature of a specialty, and creates a debt or duty by its own proper force, \* \* \* appears at once by inspection of the writing. \* \* \* The wit of man cannot devise anything better calculated for circulation. The value of the writing, the assignable quality of it, the particular mode of assigning it, are created and determined in the original frame and constitution of the instrument itself; and the party to whom the bill of exchange is tendered has only to read it, need look no further, and has nothing to do with any private history that may belong to it. The policy which instituted this simple instrument demands that the simplicity of it should be protected, and that it should never be entangled in the infinitely complicated transactions of particular individuals into whose hands it may come."

Some of the instances of this rule, commonly cited, and important to mention because of the distinction which is drawn with regard to them, are that class of orders and

<sup>12</sup> *Gibson v. Minet*, 1 H. Bl. 618.

promises where it is uncertain from the inspection of the instrument that the day or event of payment is ever to arrive. The case of *Beardesley v. Baldwin*<sup>13</sup> is an example. That was a promise to pay money "so many days after the defendant should marry." This is briefly reported as not being negotiable within the statute. Another instance is *Braham v. Bubb*,<sup>14</sup> which was a promise to pay "four years after date, if I am then living." Abbott, C. J., said: "It is contingent whether the note will ever be payable, for, if the maker should die within the four years, no payment is to be made." These will perhaps suffice to illustrate the point that such instruments contain a promise so indefinite that it hardly, for business purposes, amounts to a promise at all. It could certainly have no definite value. Hence the reason of the rule that such instruments are non-negotiable, because uncertain. It would be unwise, from a business point of view, to allow such conditions to be incorporated in instruments for which the courts proposed to formulate rules as a circulating medium.

The rule laid down by the courts that no order or promise from the terms of which it was manifestly uncertain that the money would ever be paid could be a negotiable instrument was undoubtedly wise. As much cannot be said for the rule laid down in distinction to it, in another aspect of this same point. Where the time of payment was certain to arrive the courts considered the element of uncertainty which destroyed negotiability to be eliminated, and the instrument was treated as an unconditional promise for the payment of money. This rule originated in two cases, followed in other jurisdictions, but probably overruled in

<sup>13</sup> *Beardesley v. Baldwin*, 2 Strange, 1151.

<sup>14</sup> *Braham v. Bubb*, (MS.) Trin. Term, 1826, Middlesex, (cited in *Chitty on Bills*, \*135, note.)



England, the jurisdiction of their origin. These cases are *Andrews v. Franklin*<sup>15</sup> and *Colehan v. Cooke*.<sup>16</sup> The instrument in *Andrews v. Franklin* was a promise to pay within two months after a certain public ship was paid off, and was held to be negotiable because the paying off a public ship is a thing of public nature, and certain to arrive. In *Colehan v. Cooke* the instrument was a promise to pay ten days after the death of the maker's father,—an event also certain to arrive. In this last case Lord Chief Justice Willes said: "A note, to be within the statute of Anne, need be only an express promise to pay to another or to bearer, but as to payment the act is silent; that there was no limited time beyond which if bills of exchange were made payable they were not good; and that if a bill of exchange be made payable at never so distant a day, if it be a day that must come, it was no objection to the bill." This is probably the doctrine of the present day. Says Judge Pierpoint in *Capron v. Capron*:<sup>17</sup> "As long as the payment is certain, and the uncertainty is only as to the length of time to be given, this uncertainty the law makes certain by giving him a reasonable time after the time prescribed to make payment." This decision was rendered upon a note in terms: "I promise to pay A B, or bearer. \$75, one year from date, with interest annually; and, if there is not enough realized by good management in one year, to have more time to pay." So in *Cota v. Buck*,<sup>18</sup> a note to be paid "in the course of the season now coming" was negotiable because the date of payment must come by mere lapse of time. Prof. Ames makes a most apposite criticism of the foregoing rule. "Nothing," says he, "could be

<sup>15</sup> *Andrews v. Franklin*, 1 Strange, 24.

<sup>16</sup> *Colehan v. Cooke*, Willes, 393.

<sup>17</sup> *Capron v. Capron*, 44 Vt. 412.

<sup>18</sup> *Cota v. Buck*, 7 Metc. (Mass.) 588.



more inconsistent with the negotiability of a bill or note than that the holder should have to be continually on the alert to ascertain the precise day when they should become payable, in order to charge the drawer or indorser. It is impossible to attach a definite value to anything so speculative in its nature as an obligation payable so many days after the death of the maker."

There is another class of common business instruments which the courts have deemed obnoxious to the rules necessary to protect the theory of negotiability because they are not absolute orders or promises. They are those where a person, for value, has sought to transfer some particular property or right in an instrument which has much the form of a bill or note. They empower the payee to collect moneys of the drawer or maker which are coming to him from some particular source. They are not orders or promises to pay in any event. *Jenney v. Herle*<sup>19</sup> is one. The court said: "It would be very mischievous if a tradesman applies to a gentleman for money for his bill. Says the gentleman, 'I will direct my steward to pay you,' and writes to him, 'Pay to J. S. the money mentioned in this bill out of the rents in your hands.' The steward has no rents in his hands. It can never be imagined the gentleman should be liable to be sued upon this as upon a bill of exchange." And the court accordingly refused to consider the instrument before them a bill of exchange, and considered it a "bare appointment to pay money out of a particular fund." The modern doctrine is the same. In *Munger v. Shannon*<sup>20</sup> the question was concerning this instrument: "Mr. Shannon: You will please pay to

<sup>19</sup> *Jenney v. Herle*, 2 Ld. Raym. 1361.

<sup>20</sup> *Munger v. Shannon*, 61 N. Y. 251.

W. & H. the amount of \$2,000, and deduct the same from my share of profits of our partnership." This was formally accepted. Dwight, C., said of this:<sup>21</sup> "A bill must be drawn on the general credit of the drawer, though it is no objection, when so drawn, that a particular fund is specified from which the drawee is reimbursed. \* \* \* The true test is whether the drawee is confined to the particular fund, or whether, though a particular fund is mentioned, the drawee may charge the bill up to the general account of the drawer if the designated fund turn out to be insufficient. It must appear that the bill of exchange is drawn on the general credit of the drawer. \* \* \* It must carry with it the personal credit of the drawer, not confined to any fund. It is upon the credit of a person's hand as on the hand of the drawer, the indorser, or the person who negotiates it." Instances of the above principle are an order of A upon B to pay a certain sum in the words "on account of brick work done," or "out of money in his hands belonging to me," or when the paper was expressed as payable "for value received in stock ale brewing vessels," or "out of the rents," or "out of growing substance," or "out of the net proceeds of certain ore," or "out of a certain claim."<sup>22</sup> Thus a negotiable instrument must be guarantied by the whole credit of the parties. It is to be their note of hand. It must be their promise to pay absolutely and at all events. The instruments we have mentioned would be effectuated; but they would be effectuated as equitable assignments, and not negotiable instruments. It would be the mere transfer of a single right, and not

<sup>21</sup> Id. 255.

<sup>22</sup> New York authorities: *Brill v. Tuttle*, 81 N. Y. 457; *Ehrichs v. De Mill*, 75 N. Y. 371, and list authorities collated 1 Ames, Bills & N., note p. 29.

an instrument fitted to circulate as a medium based upon the entire credit of all the parties.

There is a point at which, however, the decisions stop. This is where the instrument in form of an order or a promise to pay money was and is a promise to pay absolutely and at all events, but connected with it are other terms or contingencies which seem at first glance a part of the promise. With these cases the instrument, instead of being a transfer of a particular property or right, remains a transfer which is guaranteed by the whole credit of the transferer. The other terms of the instrument, as regards the main order or promise, are mere surplusage. The point to determine is whether the stipulation is a part of or necessary to the fulfillment of the promise or order. If it is not a promise to pay absolutely, it impairs the essential characteristics of certainty, and destroys the instrument's negotiability. The case commonly referred to as the leading authority is *Wise v. Charlton*.<sup>23</sup> This was a promise to pay £125, and contained the words: "And I have deposited certain title deeds \* \* \* as collateral security." It was contended that the right to transfer the deeds was not negotiable, while the right to transfer the note was; but the court held that the memorandum of security was not imported into the main agreement, which was to pay money. Examples of this rule are memoranda upon the face of an instrument that it "is secured according to the condition of a certain mortgage," or that "it was given in consideration of a patent right." In New York the leading case is *Leonard v. Mason*.<sup>24</sup> There the draft was: "Levi Mason, Esq.: Please pay the above note, and hold it against me in our settlement." The court said the reference to the

<sup>23</sup> *Wise v. Charlton*, 4 Adol. & E. 788.

<sup>24</sup> *Leonard v. Mason*, 1 Wend. 522.

note was merely to ascertain the amount, and to hold it as a voucher in the coming settlement between the parties. *Hodges v. Shuler*<sup>25</sup> is also noteworthy. There the promise was "to pay \$1,000, with interest, payable as per interest warrants; or, upon the surrender of this note, together with interest warrants, to the treasurer of the company, he [the treasurer] shall issue to the holder thereof ten shares of stock," etc. There were thus two courses open to the holder of the instrument. There was an unconditional promise for the payment of a sum of money. The makers might not pay in money or in stock, but the holder might, at his option, surrender the note and take the stock; thus in no wise compromising the right of any holder to collect the full amount of money called for by the instrument. The stipulation concerning the stock was an incident to the note, not of the essence of the promise to pay money.

This test thus referred to determines also the negotiability of that large class of instruments payable in the alternative which are deemed by the courts absolute payments for the promise of money. Such are options between payments of money and the delivery of some other thing. The courts declare that "the instrument is no less an instrument for an absolute promise for the payment of money because it vests the holder with the option to take payment in something else than money; and the reason is that the maker or party on whose credit the instrument circulates is absolutely bound, and bound, moreover, to pay money alone. As long as this is the obligation of the promisor, it would be inexpedient to deny the instrument the immunities of negotiability because of stipulations which are beneficial, and perhaps may add to its solvency. These stipulations vest in the promisee or person who dis-

<sup>25</sup> *Hodges v. Shuler*, 22 N. Y. 114.



counts the bill or note the option whether he will enforce them or not. The maker, in every event, is bound absolutely to pay money. For a like reason instruments payable on demand or at sight are negotiable. The holder, at his option, may fix the liability of the maker. He may thus know exactly what to pay for them when he discounts them. They have a clear, definite value in the market. They are thus negotiable.

### Payment of Money Only.

**27.** The instrument must be for payment in the medium of money.

**28. MONEY**—Means legal tender for the payment of debts at the place of payment.

**29.** Common terms excluded by the above rule are:

Funds current, current money, currency, current funds, current bank paper, current bank, common currency, notes receivable in bank, currency of Missouri, current bank notes.

Note—It would be well for the student to familiarize himself with the conflict of authorities on this point. See 1 Ames, Bills & N. pp. 48, 49. See, also, Daniel, Neg. Inst. p. 62; Bigelow, Bills & N. 13, 14.

**30.** A negotiable instrument in terms must not be for payment in any other species of property than money.

**31.** A negotiable instrument must be for the payment of money without connected promise, whether disjunctive or conjunctive, for the performance of some other act.

**32.** The amount of money and its time of payment must be certain.



**EXCEPTIONS—**(a) That the instrument is payable with interest does not invalidate it.

(b) In some jurisdictions, that the instrument is payable with current exchange does not invalidate it.

We have already pointed out that orders for goods were mere equitable assignments. So promises to pay in goods are nothing more than special contracts for delivery of chattels. And it is our purpose to show briefly why such assignments or promises are contrary to the theory of negotiability.

The meaning of "money," as applied to bills and notes, is explained in *Chrysler v. Renois*.<sup>26</sup> It is determined in the United States by their Revised Statutes known as the "Legal Tender Acts." Whatever may be used as a legal tender is money. Thus, in 1870, there were two descriptions of legal tender in use, and the court of appeals laid down the doctrine that either of these descriptions of legal tender are such as negotiable instruments may be made payable in. The determining point is whether the medium of payment specified in the bill or note is legal tender for the payment of debts at the place of the payment of the bill or note. There have been decisions which have varied from this test. In *Gray v. Worden*,<sup>27</sup> when, by the statute of Victoria,<sup>28</sup> "Canada bills" were made legal tender, the court said: "It may be that a person can make a promissory note payable in a particular coin, as in gold or silver, because they are respectively money and specie; but I think he cannot make it payable in Canada bills, because they are

<sup>26</sup> *Chrysler v. Renois*, 43 N. Y. 209.

<sup>27</sup> *Gray v. Worden*, 29 U. C. Q. B. 535.

<sup>28</sup> 29 & 30 Vict. c. 10.

not money or specie. They have no intrinsic value, as coin has; they represent only, and are the signs of, value. "Money itself is a commodity; it is not a sign; it is the thing signified." But the better view is that taken in New York. In *Thompson v. Sloan*,<sup>29</sup> the courts declare all descriptions of cash other than legal tender to be "collateral commodities, like ingots or diamonds, which, though they might be received and be in fact equivalent to money, are yet but goods and chattels." The fact that coins of other countries are current in this state does not make them legal tender. The fact that they have the mercantile standard and value of gold or silver does not make them legal tender. It is the words of the law which declare this, and that is the test to be applied.

The real reason for this position probably is that money in actual business is the one standard of value. All other commodities may rise and fall in value, but money always, in theory at least, measures this rise and fall, and remains the same. A bill or note in terms for payment in other property than money is clearly non-negotiable. It cannot be determined from the inspection of the instrument what value is sought to be transferred by it. It thus cannot act as a circulating medium. The chattel which is used as a means of payment may fluctuate in value. Thus, "a note payable in neat cattle,"<sup>30</sup> a promise to pay "in a good horse, to be worth \$80.00, and goods out of store amounting to \$20.00,"<sup>31</sup>—are non-negotiable. These instruments are special contracts, and not negotiable instruments. The damages recoverable upon them is held to be in some states

<sup>29</sup> *Thompson v. Sloan*, 23 Wend. 71.

<sup>30</sup> *Jerome v. Whitney*, 7 Johns. 322.

<sup>31</sup> *Thomas v. Roosa*, 7 Johns. 461. For other authorities see Byles, Bills, (Wood's Notes,) p. 95.

the actual value of the articles on the day stipulated for payment;<sup>32</sup> but in New York, in *Pinney v. Gleason*,<sup>33</sup> although it is admitted that these contracts are merely for the delivery of specific articles, yet when the words were, "To pay J. P. \$79.50, Aug. 1st, 1822, in salt, at 14 s. per bbl.," it was held that it was intended at the time of making the contract to receive the goods instead of money, and that the goods had, therefore, a fixed value, which must be treated as the measure of damages. In other respects, the debtor must seek his creditor to perform the contract as is the usual rule. If the chattels are ponderous, the maker of the note must seek the payee, and see where he will receive them.

Equally clear is it, for the same reason, that the order or promise must not be for the payment of money and the performance of some other act. The authority generally quoted on this point is *Martin v. Chauntry*.<sup>34</sup> This instrument was a note "to deliver up horses and a wharf and to pay money." It was held not to be a note within the statute of Anne; for, said Baron Parke in a later case,<sup>35</sup> to constitute a promissory note the promise must be to pay a sum certain and nothing else.<sup>36</sup> The reason for this is that to ingraft a special agreement upon a general promise to pay money would be at once to defeat its practical usefulness as a quasi money. Prof. Ames, with his usual force, points out the objections: "One could be indorsed, the other would have to be assigned. In some jurisdictions the action could be brought by the indorsee in his own name,

<sup>32</sup> *McDonald v. Hodge*, 5 Hayw. (Tenn.) 85; *Edgar v. Boies*, 11 Serg. & R. 445.

<sup>33</sup> *Pinney v. Gleason*, 5 Wend. 393.

<sup>34</sup> *Martin v. Chauntry*, 2 Strange, 1271.

<sup>35</sup> *Follett v. Moore*, 4 Exch. 416.

<sup>36</sup> *Cook v. Satterlee*, 6 Cow. 103.

but as assignee he could only sue in the name of his assignor. In the case of the negotiable instrument being in the hands of a bona fide holder, no defense of fraud or latent equity would avail; in case of the holder as assignee, all would avail." In spite of these objections the foregoing rule is much modified in later cases. They are classified by Senator Daniels<sup>37</sup> in learned notes shown at great length. They are of three kinds: (1) Power to confess judgments; (2) waiver of exemptions; (3) stipulations for the payment of collection and attorneys' fees. These are instruments where, in jurisdictions in which they are used, the instruments are deemed negotiable, because they facilitate, rather than clog, circulation. Further, they do not contemplate performance until after the note or bill is due, and therefore are not in violation of the principles of negotiability, because a negotiable instrument ceases to be negotiable in its fullest sense after it has become due.

### Specification of Parties.

**33.** The instrument must be specific as to all its parties.

**34.** By **SIGNATURE** is meant any written emblem made by a person with the intent of entering into a contract obligation.

**35. MAKER OR DRAWER** — The bill or note must be signed by the maker or makers, drawer or drawers.

**EXCEPTIONS**—(a) It is held by some authorities that a draft unsigned by the drawer, if accepted by the drawee, becomes a promissory note, and is negotiable.

<sup>37</sup> Daniels, Neg. Inst. §§ 61, 62, 62a.



(b) It is sufficient if the maker's or drawer's name appears in the instrument. It need not be subscribed.

(c) It may be signed by an agent.

(d) It may be signed by mark or initials, or in pencil, or printed.

36. **DRAWEE**—The bill must be addressed to some person.

**EXCEPTIONS** — (a) An unaddressed bill accepted or a bill accepted, where the drawer and acceptor are one and the same person, becomes a promissory note, and is negotiable.

(b) A bill may designate one or more persons to be resorted to in case the bill is dishonored by the drawee.

(c) If the drawee can be otherwise sufficiently identified from the bill it is sufficient.

37. **PAYEE**—The bill or note must point out some person to whom the money is to be paid.

38. The payee must be a person, natural or legal, and not fictitious.

39. The payee, under the common law, would not be the same person as the maker.

40. The payee must be in being at the time the bill or note is issued.

41. The bill or note must not be payable to persons in the alternative.

42. In case of a fictitious person, the holder, under the common law, claims by estoppel.



In the acceptance of the term as hereinafter applied to parties, the meaning of the word is somewhat more narrow than its strict legal one. In its strict legal definition a party to a contract is to whom its operation as a legal contract is confined; and while the holder of a bill or note indorsed in blank, or made payable to bearer, or claiming it under equitable assignment, is in the widest sense of the word no less a party to it than any of its actual indorsers, still the courts usually designate as parties only those who appear by name on the face or back of the instrument.

A person is made a party by his signifying by his signature or some other written emblem upon the instrument that he intends to be bound by the instrument. A signature in pencil, a telegraph signature, a signature made by another person but attested by a mark, an indorsement upon the back of the note in form "1, 2, 8," made with the intention of indorsing, are such evidences of intention. The question is whether the signer intended to bind himself or not. As matter of theory and of law, and for the reason that the note being an evidence of obligation it should point out on its face the party who primarily assumes that obligation, it is necessary that there should be a drawer or maker somewhere specified in the instrument. But as long as the signature or emblem of the drawer or maker appears anywhere upon the instrument it is deemed *prima facie* evidence of his intention to be bound by its obligations. It is immaterial in what part of the instrument the name appears, whether at the top, in the middle, or at the bottom.<sup>38</sup> Anything from which it will appear that a person intended to make the instrument his own is sufficient. The instrument bearing

<sup>38</sup> *Clason v. Bailey*, 14 Johns. 485; *Saunderson v. Jackson*, 2 Bos. & P. 238; *Welford v. Beazely*, 3 Atk. 503.

upon its face means of identifying the parties to it, it must further appear that these parties are capable of exact ascertainment; otherwise the instrument is non-negotiable. In *Gibson v. Minet*,<sup>39</sup> the Chief Baron Eyre declared: "If I put in writing these words: 'I promise to pay £500 on demand, value received,' without saying to whom, it is waste paper. If I direct another to pay £500 at some day after date, for value received, and not say to whom, it is waste paper." This principle has been generally adopted. In New York in 1830 in *Walrad v. Petrie*,<sup>40</sup> Judge Marcy, where a promissory note was made payable to Walrad or Bowman, said that it was not a promissory note. In *Douglass v. Wilkeson*,<sup>41</sup> a note signed by Herman Norton, dated December 13, 1828, for \$2,500, payable 90 days after date at the Mechanics' Bank, to the order of defendant, had this indorsement on its back: "Mr. Olcott: Pay on the within \$750. [Signed] S. Wilkeson." The point raised was that the memorandum on the back was not an indorsement, but merely a request to Mr. Olcott from Samuel Wilkeson, the payee of the note. The amount sought to be recovered in the case was the \$750 appointed to be paid on the back of the \$2,500 note, not the amount of the note itself. Only the interpretation of the words we have quoted was before the court for its construction. The court, after considering its propriety as an indorsement, and rejecting it upon that ground,<sup>42</sup> discusses it as a draft, and, by analogy, to a promissory note, under the statute of Anne, which must be payable to some person, body politic or corporate, his or her order, or unto bearer, under the authority of *Gibson v. Minet* lays down the principle in reference to bills and notes that an instrument, without

<sup>39</sup> *Gibson v. Minet*, 1 H. Bl. 618.

<sup>40</sup> *Walrad v. Petrie*, 4 Wend. 576.

<sup>41</sup> *Douglass v. Wilkeson*, 6 Wend. 637.

<sup>42</sup> *Id.* 644.

being payable by its terms to some person or to the bearer thereof, cannot be negotiable paper.

It is probable that this restriction is limited to the negotiability of the paper. This is because, under the law merchant, a negotiable instrument must show from its inspection the parties to it, except where it is made payable to bearer. Such is the clear import of the doctrine laid down in *Evertson v. National Bank of Newport*,<sup>43</sup> where certain warrants in form: "\$35. Interest Warrant for Thirty-Five Dollars. \$35.00 upon bond No. [filled in with ink] of Danville R. R. Co., payable in gold coin at the office of the Farmers' Loan & Trust Co.," and duly signed, were held non-negotiable, because, as the court of appeals said, the statute embodies the law, and determines what instruments shall be negotiable; and the court seems to imply that, even though it be the intent of the parties to make the instrument negotiable, still they cannot do so where the statute has not in words invested the instrument with the quality of negotiability, which always depends upon the terms of the instrument itself, and not the intent of the parties.

These cases, it is hoped, show the general rule that, where the parties are indefinite, the negotiability of the instrument is destroyed. The elementary decisions go further than this where any of the parties necessary to the creation of the instrument fail to appear upon it. Without a maker to a promissory note, or a drawee to a bill of exchange, the instrument is inoperative. The cases usually quoted concerning this point are *McCall v. Taylor*,<sup>44</sup> *Vyse v. Clarke*,<sup>45</sup> and *Tevis v. Young*.<sup>46</sup> In *McCall v. Taylor* an un-

<sup>43</sup> *Evertson v. National Bank of Newport*, 66 N. Y. 15, 19.

<sup>44</sup> *McCall v. Taylor*, 34 Law J. C. P. 365.

<sup>45</sup> *Vyse v. Clarke*, 5 Car. & P. 403.

<sup>46</sup> *Tevis v. Young*, 1 Metc. (Ky.) 197.

signed instrument was said to be an inchoate instrument, by which was meant that some one should have signed it to set it in circulation. This doctrine is limited by a principle sometimes found that, if an unsigned bill be accepted by the drawee, such acceptance is in effect a promissory note; and, further, that the authority to insert the name of the drawer will be presumed. But that this would be law throughout the United States is doubtful.<sup>47</sup>

So, also, the elementary principle is that, without a drawee, the instrument cannot be treated as a valid one. It is not a bill of exchange. The reason for this is that, as we have seen, the first essential of a bill is an order; and, a drawee not being nominated, the instrument must fail. It is inherent in its nature that there must be a drawee, who in theory has funds of the drawer, which he is bound to apply upon the draft. The courts, however, have limited this principle wherever it was consistent with common sense to do so. Their idea appears to have been that, if there was an actual obligation to enforce, they would enforce it despite technical inaccuracies. Hence the courts have taken any reason to support the instrument as an obligation, rather than let it fall to the ground. In *Peto v. Reynolds*,<sup>48</sup> Barons Parke and Alderson both agree that if the instrument, which was unaddressed, could be shown to be evidence of an obligation, then, while they could not treat it as a bill, because of the absence of the drawee's name, they would hold it to be a promissory note. This is the principle found in *Block v. Bell*,<sup>49</sup> where the word "Accepted," over a signature, written across an instrument which has the form of a demand promissory note,

<sup>47</sup> *Drummond v. Drummond*, reported in *Ames, Bills & N.* p. 883, and cases there quoted.

<sup>48</sup> *Peto v. Reynolds*, 9 Exch. 410.

<sup>49</sup> *Block v. Bell*, 1 Moody & R. 149.



is construed as such an indorsement of the obligation intended to be evidenced by the invalid instrument that it is equivalent to a promise to pay it. And the courts even go so far as to say that, if the drawee be not specified in the bill, but otherwise capable of identification from it, that will suffice. In *Gray v. Milner*,<sup>50</sup> the bill was addressed, "Payable at No. 1 Wilmot St., opposite the Court Bethnal Green, London," and the argument was that, not being addressed to any one, it was not a bill of exchange. It appeared, however, in answer to this, that "Accepted. Chas. Milner" was written across the face of the bill. The court found that this was the only person who could have been meant, because Milner had himself acknowledged his liability by writing his acceptance on the bill.

The principle is the same where the drawer and drawee are ostensibly different, though in law the same person; or where the drawee is a fictitious person. In *Fairchild v. Ogdensburgh R. Co.*,<sup>51</sup> the instrument was an order drawn by the president of the railroad upon its treasurer, directing the latter to pay A B, or order, a certain sum of money, and was, in effect, an order of the corporation upon itself. Here the court of appeals said, because there were not the two parties requisite for a bill of exchange, the instrument was not a bill of exchange, but, following the authority of the English courts, that it was a promissory note.<sup>52</sup>

Another elementary principle of the form of a negotiable instrument is that the payee must be definitely ascertained. By this seems to be meant that the payee must have some identity. And the test, where any payee is attempted to be specified, is, does the instrument by any construction

<sup>50</sup> *Gray v. Milner*, 8 Taunt. 739.

<sup>51</sup> *Fairchild v. Ogdensburgh R. Co.*, 15 N. Y. 337.

<sup>52</sup> *Bull v. Sims*, 23 N. Y. 570; *Miller v. Thomson*, 3 Man. & G. 576.



point out as payee some person, natural or legal, with whom a contract can be deemed to have been made, and by or against whom it can be enforced? In some of the instruments we have already considered—"Pay on the within \$750,"<sup>53</sup> or "Good for \$126 on demand," or "I O U \$160, to be paid on demand"—the name of the payee is absent altogether, and they are vitally defective. So in the note, "I promise to pay the estate of Moses Lyon, deceased,"<sup>54</sup> while there was a payee attempted to be specified, still there was no such person, natural or legal, in existence. It could not be Moses Lyon. It might be his executor or representative, it might be his heir, and the court would not and could not fix upon which of these parties it was where neither was specified. Like this last case, and perhaps more clear in its application, is the one usually quoted as the leading one on this point,<sup>55</sup> where a note was made payable nine months after date "to the secretary for the time being of a certain society." This was a promise to pay some one whom the maker did not know, and who might be secretary of the society nine months hence. Clearly, there was no party with an assenting mind to be a party to a contract. Like this are such instances as the well-known case, *Blanckenhagen v. Blundell*.<sup>56</sup> See, also, *Walrad v. Petrie*,<sup>57</sup> already quoted, where a note was made payable to A or to B. With these the promise, in addition to being contingent in its nature, was indefinite as to its payee. Neither A nor B had the full, clear, free right of enforcement of the instrument. It will perhaps illustrate this idea to show in contrast instruments very similar in

<sup>53</sup> *Douglass v. Wilkeson*, 6 Wend. 637.

<sup>54</sup> *Lyon v. Marshall*, 11 Barb. 242.

<sup>55</sup> *Cowie v. Stirling*, 6 El. & Bl. 333.

<sup>56</sup> *Blanckenhagen v. Blundell*, 2 Barn. & Ald. 417.

<sup>57</sup> *Walrad v. Petrie*, 4 Wend. 576.

language, but widely different in principle. In contrast to a promise to pay the secretary for the time being is the promise in *Davis v. Garr*.<sup>58</sup> There the promise was to pay certain persons designated as the "trustees or their successors in office." This was held to constitute a good promissory note, because there was a perfected contract with definite persons. The mere fact that the rights of these persons were entailed upon their legal successors did not vitiate the contract, for all contract rights devolve and are assignable. A contract payable to the trustees of a company not incorporated would not have been a note, because the payee would have no identity. So, in contrast to a promise to pay A or B is *Watson v. Evans*.<sup>59</sup> There the promise was "to pay A, B, & C, or to their order, or the major part of them." This was held to constitute a good promissory note, because there was a joint interest in the parties, who, taken together, constituted a distinct legal entity, or one person in view of law.

There is another aspect of the payee as a party to the instrument which should be noticed. It is when the instrument is drawn payable to the order of the maker or drawer or of a fictitious person. In *Hooper v. Williams*,<sup>60</sup> the court explained that notes payable to the maker's order were incomplete instruments, and had no binding effect until indorsed. No right to sue could exist in any one in case of such a note until the order was made in the shape of an indorsement. Until that indorsement was made it was an imperfect instrument, and in truth not a promissory note at all. It was perfected by an indorsement to another person, because the original writing and indorsement, taken

<sup>58</sup> *Davis v. Garr*, 6 N. Y. 124.

<sup>59</sup> *Watson v. Evans*, 1 Hurl. & C. 662.

<sup>60</sup> *Hooper v. Williams*, 2 Exch. 18.

together, became a binding contract, though an informal one, between the maker and the indorsee. In case of a bill of exchange or note made payable to the order of a fictitious person, Lord Ellenborough, in *Bennett v. Farnell*,<sup>61</sup> is supposed to have held that such a bill was neither in effect payable to the order of the drawer nor to bearer, but was completely void. This rule, however, he afterwards qualified by the statement: "Unless it can be shown that the circumstance of the payee being a fictitious person was known to the acceptor." He thus made the acceptor liable by estoppel, and this is probably the present attitude of the courts. In New York this doctrine is changed by statute to the effect that a note "made payable to the order of the maker thereof, or to the order of a fictitious person, shall, if negotiated by the maker, have the same effect and be of the same validity, as against the maker and all persons having knowledge of the facts, as if payable to the bearer."<sup>62</sup> This statute, the wise spirit of which has been followed in other jurisdictions, is extended in New York in its operation. In *Mechanics' Bank v. Stratton*<sup>63</sup> the check in suit was demurred to because it was in form: "Pay to bills payable, or order." It was declared by the general term of the supreme court to be non-negotiable, but the court of appeals said that by using the words "or order" the maker showed he intended that the instrument should be transferred, and be negotiable. In naming the persons to whose order the instrument is payable the maker limits the negotiability to those persons, and imposes the condition of indorsement upon them upon its first transfer. But no such

<sup>61</sup> *Bennett v. Farnell*, 1 Camp. 130.

<sup>62</sup> Rev. St. N. Y. p. 2499, § 5; *Plets v. Johnson*, 3 Hill, 112.

<sup>63</sup> *Mechanics' Bank v. Stratton*, 3 Abb. Dec. 269.

intention is indicated by fictitious or an impersonal payee; hence words of negotiability, in such connection, are capable of no reasonable interpretation except that the bill shall be negotiable without indorsement. In other words, it is to be treated in the same manner as if it had been made payable to bearer. In *Irving Nat. Bank v. Alley* <sup>64</sup> the court goes further. It holds that, even where a party upon a note of this character, against whom a liability is sought to be enforced, does not have knowledge of the facts, in all other cases than that of the fictitious payee, he cannot raise the point that it was payable to the maker's or drawer's order, but will be estopped from doing so. Thus the old common law is substantially changed, and a wiser and more equitable one would probably now prevail.

### Capacity of Parties.

**43.** The capacity of parties in general is governed by the same rules as their power to make a contract. It is of two kinds :

- (a) Capacity to incur liability.
- (b) Capacity to transfer the instrument.

**44.** The following classes of persons incur no liability, though they may make a valid transfer of the instrument :

- (a) A person non compos mentis.
- (b) An infant.
- (c) In some jurisdictions, a married woman.
- (d) A corporation, when the act is ultra vires.
- (e) An alien enemy.

<sup>64</sup> *Irving Nat. Bank v. Alley*, 79 N. Y. 536.



**45. The following persons may transfer, but are bound personally by the transfer:**

- (a) **Executors of deceased persons.**
- (b) **Administrators of deceased persons.**
- (c) **Guardians.**
- (d) **Trustees.**
- (e) **An agent for a principal, whether disclosed or undisclosed.**

The generic principles governing the capacity of parties to contracts are not changed in their application to bills and notes. A full discussion of that liability belongs more properly to a work upon the general subject of contracts than to a work of this character. The defenses infancy, alienism, lack of contracting mind, and of transcending corporate powers, and their effect upon the position of the bona fide holder, will be considered to a limited degree later on under their proper heads. We speak here in a most general way of persons acting in a representative capacity as parties to negotiable paper.

Executors, administrators, guardians, and trustees occupy at least one general property relation in common: an estate is committed to them to apply. An executor or administrator is the hand of the court to collect property and pay debts. A guardian or trustee has, in addition to these functions, to hold property, and to keep it intact as far as in ordinary human prudence it can be done. They hold this property, as the law phrases it, in "*autre droit*," which means that they hold for others, and not in their own right. They are allowed by law to charge the estates left in their care with certain disbursements, which, in general, are those necessary to carry into force and effect the estate which they are to administer. But, aside from these, the estate



cannot be bound. It cannot, for example, be bound by an executory contract. If the representative makes such a contract, the law, in order that the obligation may stand, rather than fall, holds the representative personally responsible, not the estate which he represents. Thus in the case of the executory contract of negotiable paper, the law deems the descriptive character setting forth the representative character in which the party has signed mere surplusage, and treats it as his mere personal obligation. This principle is extended so far that an executor is not permitted to charge the estate, although he is expressly authorized to do so by the term of the will under which he acts.<sup>65</sup> This, however, does not preclude the power of transfer. If a bill or note be negotiable, it may be indorsed, but the trustee indorsing is personally liable unless he exempts himself by an indorsement without recourse.

The idea underlying this is the same with regard to agents. The principal text relates to cases where the name of the agent appears upon the instrument, and that of the principal does not, or where the name of the principal appears in such a way as to leave it doubtful who was the party to the bill; for if the bill or note be drawn or indorsed "A B, by C D," or "A B, by his attorney, C D," it appears clearly that A B was the party to the instrument, provided C D had the right to place his name there. So, also, "C D, for A B," or "C D, agent for A B," is a term usual and proper to create an agency; and in such cases A B would also be bound. It would seem to be the safer rule that no party can be charged as principal upon a negotiable instrument unless his name is thereon disclosed, and that, where one person signs or indorses an instrument in his own individual name, though in fact as an agent for another, all evidence must be excluded to show that it

<sup>65</sup> Delaware, L. & W. Ry. Co. v. Gilbert, 44 Hun, 201.

was intended at the time of the signing to bind the liability upon another. The reason for this is that a negotiable instrument must show exactly what it is upon its face, in order to be a negotiable instrument. The cases adopting this wise rule go to the extent of saying that this principle applies even though it was known that the signer was an agent, and sometimes it is in fact agreed that the person signing shall only create a liability to bind some other person. But any such evidence is clearly contradicting the terms of a written instrument. Hence, in a bill made by, payable to, or indorsed by, "J S, agent," the word "agent" is surplusage, and J S is personally liable. This is not the law in some of the states. It is doubtful whether it is the law in New York. Such authorities as *Mott v. Hicks*,<sup>66</sup> *Green v. Skeel*,<sup>67</sup> and *Moore v. McClure*,<sup>68</sup> lay down a different doctrine. It appears to have been the sense of the court in *Mott v. Hicks* that extrinsic testimony might be admitted to show that where an indorser signed his name as agent it was competent to show that it was agreed between the parties that such indorsement was merely for the purpose of transfer, and that the indorser, as agent, was not personally liable. This is also the doctrine in *Green v. Skeel*, where it is held that a person signing his name as agent in the business of his agency is not personally liable. On the other hand, in *DeWitt v. Walton*,<sup>69</sup> the addition of the word "agent" is treated as mere *descriptio personae*, and this is emphasized and affirmed in *Pumpelly v. Phelps*,<sup>70</sup> and in a dictum in *Briggs v. Partridge*<sup>71</sup> this is further approved.

<sup>66</sup> *Mott v. Hicks*, 1 Cow. 540.

<sup>67</sup> *Green v. Skeel*, 2 Hun, 486.

<sup>68</sup> *Moore v. McClure*, 8 Hun, 553.

<sup>69</sup> *De Witt v. Walton*, 9 N. Y. 571.

<sup>70</sup> *Pumpelly v. Phelps*, 40 N. Y. 59.

<sup>71</sup> *Briggs v. Partridge*, 64 N. Y. 359, at page 363.

### Delivery of Instruments.

46. An undelivered bill or note is inoperative, because delivery is essential to the final completion of every written contract. Until delivery, the contract is revocable.

47. **DELIVERY**—Means transfer of possession with intent to transfer title, and is of two kinds:

48. **ACTUAL DELIVERY**—The manual passing of the instrument itself.

49. **CONSTRUCTIVE DELIVERY**—Is in general some act manifesting intent to transfer right of possession while the possession of the bill is actually with another.

50. **ESCROW**—Means a delivery of a bill or note to a third party (not the payee) to hold it until certain events happen, or certain conditions are complied with.

In *Marvin v. McCullum*,<sup>72</sup> the inception of a note is defined by Judge Platt to mean “when it was first given, or when it first became the evidence of an existing contract.” It has no legal inception until it is delivered as evidence of a subsisting debt. Merely writing and signing a note, and retaining it in the hands of the drawer, forms no contract. No person has then a right of action upon it any more than if it had been blank paper. The inception of the paper is thus when there came into existence a right of action upon it.<sup>73</sup> The business reasons for this are that

<sup>72</sup> *Marvin v. McCullum*, 20 Johns. 288.

<sup>73</sup> *Eastman v. Shaw*, 65 N. Y. 527, 528.

while the note or bill was in the maker's hands it could be erased, canceled, or revoked.<sup>74</sup> It could not, therefore, be an evidence of indebtedness until it was beyond such possibility. The decisive step was thus the delivery. Now, what is delivery? The New York authorities are *Catlin v. Gunter*<sup>75</sup> and *Cowing v. Altman*.<sup>76</sup> Two things must concur in a delivery. The first is the transfer of the possession of the instrument, the second an intent to transfer the title on the part of the transferrer, and the acceptance of the instrument by the transferee with intent to acquire title to it. The minds of both parties must concur. This is the law laid down in *Kinne v. Ford*,<sup>77</sup> when the question was whether an instrument left upon a clerk's desk, unknown to him, and without his accepting it, was a delivery, and the court said it was not. So, in *Artcher v. Whalen*,<sup>78</sup> it was the intention to deliver the instrument left in escrow on the 1st of May, but on April 30th the transferrer died. Under such a state of facts, there could have been no actual delivery nor intention to deliver the instrument. The necessary elements to a delivery were wanting. In illustration of these principles we may mention some of the many phases that appear in the books. For example: A promissory note, unknown to the payee, but found in the maker's possession after his death, is invalid, because incapable of delivery. So a bill placed in the hands of an agent or a stakeholder, but undelivered, may be recalled; and also a bill left with the drawee for acceptance, and accepted by him, but not yet delivered, may have its acceptance canceled, because no contract rights were vested under it.

<sup>74</sup> *Cox v. Troy*, 5 Barn. & Ald. 474.

<sup>75</sup> *Catlin v. Gunter*, 11 N. Y. 368.

<sup>76</sup> *Cowing v. Altman*, 71 N. Y. 435, 79 N. Y. 167.

<sup>77</sup> *Kinne v. Ford*, 52 Barb. 196.

<sup>78</sup> *Artcher v. Whalen*, 1 Wend. 179.



This last, we may digress to say, is probably now the law, though it was formerly held that an acceptance after signature could not be revoked, on the ground that, acceptance being once made, the rights of third parties attached, and a revocation would prejudice the drawer.<sup>79</sup>

In delivery upon conditions, or, as it is called, in the principal text, there are questions of much delicacy involved. Such deliveries are of two classes: delivery as an escrow, and a delivery upon a condition subsequent. An escrow is defined in *Worth v. Case*,<sup>80</sup> as a delivery to a third person, made to await some affirmative action on the part of the other party before he is entitled to the absolute delivery of the instrument, as distinguished from the affirmative action of the party who delivers an escrow. The authorities seem to agree that a delivery as an escrow has these elements: (a) It must be to some person not ultimately entitled to receive it; (b) that the instrument takes effect the instant the condition of the escrow is fulfilled, even though the depository has not formally delivered it to the person entitled to the possession.<sup>81</sup>

A delivery upon a condition subsequent is where the instrument is delivered to the payee, to be held by him pending some future event. The sense of this position would seem to be that an instrument in the hands of the payee was a completed written contract, and that evidence to show its conditional delivery would be in contravention of such contract; and such, perhaps, is the common law. But the courts, especially of New York, make a distinction. It is explained in *Juilliard v. Chaffee*.<sup>82</sup> There Judge Danforth

<sup>79</sup> *Bentinck v. Dorrien*, 6 East, 199.

<sup>80</sup> *Worth v. Case*, 42 N. Y. 367.

<sup>81</sup> *Edw. Bills & N.* § 243; *Daniel, Neg. Inst.* 68, and cases cited; *Earl v. Peck*, 64 N. Y. 596.

<sup>82</sup> *Juilliard v. Chaffee*, 92 N. Y. 529.



collates the authorities, and deduces the rule that a party sued by his promisee may always show that the instrument was delivered to the payee to take effect only on the happening of some future event, or that its design and object were different from the effect of its language if taken alone. In that case, as the note did not indicate all the agreement, it was held the full purpose of its execution might be shown. So in *Benton v. Martin*,<sup>83</sup> the law was laid down that conditions might be affixed to the delivery of a note in the hands of a payee; that as between the immediate parties the conditions would be binding, and a defense. This, of course, would not apply to the bona fide holder.<sup>84</sup>

### Date.

**51. DATE**—In a bill or note, is not necessary to its validity.

**52. Antedating or postdating a bill does not vitiate it.**

The date of an instrument is not necessary in law, in that its absence does not avoid the instrument. It is not an essential characteristic of the instrument, as other qualities are characteristic of the instrument or its negotiability. For this reason the date may be supplied by parol, the date of delivery being the day of date; or it may be antedated or postdated; or, if the date be left blank, all parties are deemed to consent that the holder may fill up the blank

<sup>83</sup> *Benton v. Martin*, 52 N. Y. 570.

<sup>84</sup> See § 131 et seq., post. Note, also, *Bookstaver v. Jayne*, 60 N. Y. 146.

with a date. Legally speaking, the chief importance of a date is that it is presumptive evidence of the time of its actual execution, a presumption, however, which may be contradicted by parol evidence.<sup>85</sup> Likewise the place of date is supposed to be contemplated by the parties as the place of payment, because, in the absence of all other guides to any information on this point, the courts turn to the instrument, itself, and say the place of date is probably the place of residence of the parties; and it is reasonable to suppose that the parties contemplated the place of their residence as the place where the instrument was to be paid. It becomes important sometimes in determining whether the instrument is a foreign or inland bill or note, and where presentment and demand are to be made, or where notices of dishonor are to be sent, and questions of that character.<sup>86</sup> These remarks are to be understood with limitations, some of which are as follows: The date of a completed instrument cannot be changed unless by mutual consent without avoiding it.<sup>87</sup> Neither must it be understood that dating a note at a particular place makes that place the one at which payment should be demanded. It does not.<sup>88</sup> It merely is a presumption to guide the court. And, lastly, in practical affairs an instrument without date will not circulate, because neither banks nor merchants will discount it. The date, in most instances, determines when the instrument is to be paid; and unless it has a date, or one is agreed upon and inserted, it is useless as a circulating medium.

<sup>85</sup> *Germania Bank v. Distler*, 4 Hun, 633, affirmed in 64 N. Y. 642; *Drake v. Rogers*, 32 Me. 524; *Brewster v. McCardell*, 8 Wend. 479; *Mitchell v. Culver*, 7 Cow. 336.

<sup>86</sup> *Stewart v. Eden*, 2 Caines, 121; *Taylor v. Snyder*, 3 Denio, 145.

<sup>87</sup> See § 140, post.

<sup>88</sup> *Anderson v. Drake*, 14 Johns. 114.

### Value Received.

**53. VALUE RECEIVED**—Is not necessary to be expressed in a negotiable instrument. It means:

- (a) In a note, value received by the maker of the payee.
- (b) In a bill before acceptance, value received by drawer of the payee.
- (c) In a bill after acceptance, value received by acceptor of the drawer.

The expression "value received" of course is an acknowledgment of the receipt of a consideration sufficient to support the contract, and make it a binding promise for the payment of money. It raises the various questions relating to consideration, which, so far as they pertain to the circulation of the instrument, are commented upon hereafter. In itself, as appears from the principal statement, with bills it means that a consideration has been received by the payee or acceptor, according as the bill has or has not been accepted. With notes it implies a consideration received by the maker. Indorsers, from the mere fact of their indorsement, are deemed to have received a consideration; each indorsee from his immediate indorser. And thus the instrument in its circulation bears upon itself *prima facie* proof of a consideration received by any of the parties against whom it is sought to be enforced. The student must, however, note that, although these words are well-nigh universal in negotiable bills and notes, they are in no wise necessary to them. Their omission is unimportant, because the negotiable instrument itself

imports a consideration. A mere production of the instrument on a trial is *prima facie* proof of the fact that it was given for a sufficient consideration.<sup>90</sup> The courts of New York in a late decision<sup>91</sup> have declared that this rule applies to certain classes of non-negotiable promissory notes, or at least to that class which import an absolute promise to pay money, but without words of negotiability. It is hard to say what effect this decision will have upon the rule that in case of a non-negotiable instrument, unless a consideration appeared upon the face of the instrument, and *prima facie* evidence was thus created by an admission upon the instrument itself, a consideration must be proved. But it will perhaps be the case that, except in absolute promises for the payment of money, the rule will still prevail.

### Days of Grace.

**54. DAYS OF GRACE**—Are days added to the nominal time of payment of all bills or notes except those impliedly or expressly payable on demand, and are computed by excluding the day of date and including day of payment.

Originally, days of grace were days allowed the drawee or acceptor of a foreign bill by the holder to enable him to provide funds to meet the bill. They were days obtained by the drawee or acceptor through the grace of the holder. This was first custom, then law. These days are now extended to cases of negotiable inland bills and promissory

<sup>90</sup> *Underhill v. Phillips*, 10 Hun, 591; *Kimball v. Huntingdon*, 10 Wend. 675.

<sup>91</sup> *Carnwright v. Gray*, 27 N. E. Rep. 835, s. c. 127 N. Y. 92.



notes as well as the foreign bills to which at first the custom was only appended. It extends under the common-law rules to all negotiable bills of exchange or notes, except those wherein the instrument is made payable on demand, or without specification of time, in which case on demand without grace is understood, or wherein grace is expressly waived. This is sometimes modified by the statutes of the several states. Thus, in New York, bills or notes payable at sight are not entitled to grace, nor are checks or bills of exchange or drafts drawn at or after sight on banks.<sup>92</sup> This last rule is strictly confined to the cases pointed out by the statute.

In some states, too, promissory notes are not entitled to grace, because, they not being negotiable in themselves, being made so by statute, are not placed upon the footing of bills of exchange, unless the statute expressly gives them all the privileges of negotiability. But where the statute does place notes on the footing of bills of exchange, then grace follows as a matter of course. The same reasoning applies to non-negotiable instruments, and they are not entitled to grace.

The number of days allowed as grace is generally three, and is computed by adding them to the days or months, reckoned as calendar months, stipulated in the instrument. The day of date is excluded from the calculation and the day of payment included.<sup>93</sup> This computation by months does not take into account the varying length of the month. The time reckoned in months may be longer or shorter, according as there are more or less days in the month. It

<sup>92</sup> Rev. St. N. Y. p. 2503, (Laws 1857, c. 416.)

<sup>93</sup> *Roehner v. Knickerbocker Life Ins. Co.*, 63 N. Y. 160; *Bellasis v. Hester*, 1 Ld. Raym. 280; *Campbell v. French*, 6 Term R. 212; *Hartford Bank v. Barry*, 17 Mass. 24; *Ripley v. Greenleaf*, 2 Vt. 129.



also does not take into account the fact that the last day of grace happens upon a non-business day. In this last event, though in case of all non-commercial instruments the time which must expire before suit can be brought against the debtor is extended to the next succeeding business day, yet with negotiable instruments, under the common law, grace is not extended in this way. With them the days of grace end on the next preceding business day, because the debtor cannot compel the creditor to extend the indulgence which a custom of doubtful advantage has already attached to the paper. This rule has been wisely modified by the statutes of many jurisdictions, as in New York, where the day of payment has been declared to be the next succeeding secular or business day.<sup>94</sup> But, in the absence of any express statute, it is generally understood that the common-law rule would prevail.

### PROBLEMS.

(1) "I owe you \$100, to be paid May 5th." "Due C or order \$100 on demand." Are these promissory notes? Which of them can be transferred by indorsement, and why?

(2) "I promise to pay C, or order, \$100 at my store, May 1, 1880, (or in goods on demand,) value received." Is this a negotiable note?

(3) "Mr. Tupper has left in my hands \$200." Is this a promise to pay?

(4) "Balance due A, \$178, for work done." Is this a promise to pay?

(5) An order is given for the payment of accrued rent, though the rent is payable in money. Is this a negotiable draft? Do the terms import an order?

(6) "I promise to pay A, or order, if B does not." Is this negotiable?

<sup>94</sup> Rev. St. N. Y. pp. 2506, 2507.

(7) "I promise to pay A, or order, if I shall sell my Main St. lot." Is this negotiable?

(8) "Pay C, or order, \$100, and all other sums which may be due to him." Can this be transferred by indorsement?

(9) "I promise to pay A, or order, when he shall marry." Is this a proper condition?

(10) "Pay C, or order, \$100, 'with lawful interest.'" Can you negotiate this?

(11) An instrument promising to pay £100. 10s. 5d., executed and payable in New York. Is this a negotiable instrument?

(12) "Pay C, or order, \$100 'in current funds of the State of Ohio.'" Must this be assigned or indorsed to be transferred?

(13) "I promise that J. S. shall receive \$100." Is this an evidence of indebtedness or a promise to pay?

(14) Due A, or bearer, \$100." Is this a promise to pay? Give your reason.

(15) Explain the difference as regards negotiability between these two instruments: "Pay C, or order, \$100, 'by two equal installments, due 1st January and 1st July;'" and "Pay C, or order, \$100, 'by installments;'" not stating date or amount.

(16) An order for the delivery to bearer on demand of a certain quantity of iron. Is this a negotiable instrument? Who has title to the iron?

(17) "Pay C, or order, \$100, on demand, or in three years, with interest during said term, or for such further time as said principal, or any part thereof, shall remain unpaid." Can such a condition be put in a negotiable instrument?

(18) "Pay C, or order, \$100, 'as soon as collected from my accounts at P.'" Can a negotiable instrument be drawn in such terms?

(19) "Pay the bearer \$100 on April 1st, 1871." Is the bill entitled to grace?

(20) A note dated 31st January is payable one month after date, "without grace." When is it due? When would a similar note, dated January 1st, be payable?

(21) "Pay to C, D, and E, or the order of any two of them." Is this transferable as a negotiable instrument? Who would be the necessary indorsers?

(22) A promise to pay C, or order, \$100 in cotton or labor. In case of breach of this contract, what sum could C recover?

(23) "Pay to C, the treasurer for the time being of the X Company." Is this valid? Is there a payee to this note?

(24) "Pay to order of the administrator of X, deceased." Is this a negotiable note?

(25) May a promise to pay in money or property at the maker's option be embodied in a negotiable note? Why?

(26) Action by indorsee against the drawer of a bill. Is it a defense that the payee was an infant when he indorsed the bill?

(27) Bill payable three years after date, "with interest thereon till paid." From what date does interest run?

(28) Bill payable on demand, with interest. When does interest run from?

(29) A corporation chartered to build a railroad gives its note for materials used in the construction of the road. Is it liable thereon? How is it if it accepts for accommodation to aid another company in constructing its road?

(30) Is a signature to a note in pencil sufficient?

(31) Is an instrument payable "in such installments, and at such times as C [payee] may require," proper in form?

(32) Pay C, or order, \$100, "with current exchange on New York." Is this an order to pay a sum certain?

(33) "Pay C, or order, \$100, one year after my death." Is this an order to pay at a time certain?

(34) Is a signature made by another person, but attested by mark, a sufficient signature to a note?

(35) "Pay C, or order, \$100 out of the moneys now due or hereafter to become due to me under the will of my late father, and before making any payment to me thereout." Explain how this is an improper form of words for a draft.

(36) A note for \$100 is made payable by two equal installments on January 1st and February 1st. When do the installments fall due?

(37) D, the holder of a bill payable to his order, dies. X, his executor, indorses the bill away, signing the indorsement, "J X, executor of D." What is X's liability on this indorsement?

(38) Is an instrument in the form of a bill, but addressed "To ———, New York city," sufficient as to parties?

(39) Will a lithographed signature, or a signature impressed with a stamp, be treated as a legal signature to a bill or note?

(40) C, the holder of a bill, specially indorses it to D. He dies before delivering it, but his executor subsequently hands the bill to D. May D sue on the bill as the lawful holder?

(41) "Pay C, or order, \$100, and deliver up the wharf to him." What are the objections to transferring this as a negotiable instrument?

(42) "Pay C, or order, \$100, and take up my note for that amount." Could this instrument be discounted?

(43) A draws a bill on B, and negotiates it to C. B is a fictitious person. On what theory may C sue B and recover?

(44) Does a promise to pay \$100 and reasonable (or 10 per cent.) attorneys' fees, if not paid at maturity and suit is instituted, destroy the negotiability of a note?

(45) "Pay C, or order, \$100, on account of moneys advanced by me for the X company." Would such an instrument be a negotiable draft?

(46) "Pay C, or order, \$50 or \$60." For what amount would the acceptor of this be liable to an indorsee?

(47) State the difference, if any, as regards negotiability between these two instruments: "Pay C, or order, \$100, in two years, with interest, or without interest if paid within one year;" and a promise to pay \$100, without interest, on or before January 1, 1882.

(48) Money is lent to the X Company. A note for the amount is given in the form, "We promise to pay, et cet.," signed,

"J. B., {  
"J. S., { Directors of the X Company, Limited.  
"J. T., Manager." Who are liable?



(49) B, by will, directs his executor to carry on his business. He does so, and in the course of the business accepts bills, signing "J. S., Executor of B." Is B's estate liable on these acceptances?

(50) An instrument is made promising to pay \$100 "in Canada money," and is executed and payable in New York. Is it payable for a sum certain?

(51) "Pay C, or order, \$100 out of the money due from X as soon as you receive it." State whether or not this is a negotiable draft, giving reasons.

(52) A draws a bill, signing it "J. A., Agent." Is J. A. liable as drawer? Is his principal?

(53) Suppose an instrument in all respects to be in the form of a bill, but where the address to the drawee should be are the words "At Messrs. B. & Co." Is the bill properly addressed?

(54) "Pay C, or order, the balance due to me for building a house." Is this an order, or merely a request to pay money?

(55) B makes a note payable to C, or order, one year after his death, and sends it in a sealed wrapper to X, with instructions to return it to B if he calls for it; otherwise not to be opened in his lifetime. Is this a delivery?

(56) "Pay C, or order, \$100, on or before three years from date." When is this payable?

(57) "Pay C or order \$100, one year from date, or before, if realized from the sale of a certain machine." Is an indorser of this entitled to notice of its dishonor?

(58) Instrument in the form of a bill payable to drawer's order, not containing the name of the drawee, but expressed to be payable "at No. 1 X Street, London." B, who lives there, accepts it. Is B an acceptor?

(59) A note is made in the form, "I, J B, promise, et cet.," and is without signature. Is this a sufficient note if in the handwriting of J B? "Pay C or D." Is this valid as to parties?

(60) "Six months after date, pay to the treasurer for the time being of the C Institution." Do these terms constitute a valid draft?



(61) B, who is indebted to C, makes a note for the amount payable to C. B dies, and the note is afterwards found among his papers. Can C bring an action on the note?

(62) B makes a note in favor of C, and delivers it to a stakeholder. Does C then acquire any right to the note?

(63) C, the holder of a bill, specially indorses it to D; C transmits it by post to X, his own agent. X informs D that he has received the bill, but does not give it to him, or undertake to hold it on his account. Can C revoke the transaction and cancel his indorsement to D?

(64) "Pay C, or order, \$100, the demand I have against the estate of X, deceased." If the estate of X is insolvent, may the holder recover of his prior indorser?

(65) "Pay C, or order, \$100, 'against cotton, per Swallow.'" Does this destroy its negotiability? What is the meaning of "Against cotton, per Swallow?"

State which of the following conditions are proper to be inserted in negotiable instruments, giving your reasons:

(66) "Pay C, or order, \$100, on the 1st January when he comes of age."

(67) "Pay C, or order, \$100, when I marry X."

(68) "Pay C, or order, \$100, when he arrives at age."

(69) "Pay C, or order, \$100, when the estate of X is settled up."

(70) "Pay C, or order, \$100, on the completion of the X railroad."

(71) "Pay C, or order, \$100, Dec. 25th, 1819, or when he completes the building according to contract."

### CHAPTER III.

#### ACCEPTANCE OF BILLS OF EXCHANGE.

- 55. Definition.
- 56. Requisites of Acceptance.
- 57. Varieties of Acceptance.
- 58-60. Acceptance According to Tenor.
- 61. Who may Accept.
- 62. Delivery.
- 63-64. Forms and Varieties of Acceptance.
- 65. Implied Acceptance.
- 66. Acceptance in Writing.
- 67-68. Acceptance on Separate Paper.
- 69. Parol Acceptance of Future Bill.
- 70-72. Acceptance for Honor or Supra Protest.

#### Definition.

**55. An acceptance is an undertaking by the drawee to pay the bill when due in money.**

It will perhaps help the student to understand the theory of acceptance to present it to him as a phase of the elementary theoretical notion of a contract as constituted by an offer and acceptance.

The acceptance is the assent to the proposition contained in the draft, which on its part is an offer, and which offer and assent, taken together, constitute a contract right or relation. In its practical aspect as a contract, it obviates the transfer of cash by means of credit. In the illustration under § 1, C owed A. A, we may assume, says to B, "Give me cash for my debt, and treat the debt itself as cash." B agrees to this proposition, and A gives, as an evidence of

the transfer of the debt to B, the ordinary draft, making him the payee; further, (following the illustration,) B turns over this evidence of indebtedness, and the right of action along with it, to D, and D, on his part, to E. E now comes with the paper to C. At this point the relation of the parties is as follows: The right A had to the debt of C is now held by E in the shape of a piece of commercial paper, which E is about to present to C. A is liable to B for the £1,000 B paid A; B, on his part, is liable to D for the £1,000 paid by D to B; and so on. As yet C owes nothing to B, D, or E, and he only owes A for the debt he owed him in the first place. The paper in E's hands has been passing from hand to hand, used for the payment of debts, and accepted as such upon the supposed solvency of each person who has held and indorsed it. C now says, "Yes, I will pay this £1,000;" and evidences his assent by writing on the bill "Accepted" over his own signature. At that moment he enters into a contract relation with the holder of the bill, and also with the holders and indorsers, that he will pay the bill. In other words, C promises B, D, and E, and each of them severally, that he will pay £1,000 to the holder. Thus, B, D, and E may look to either C or A for the £1,000 they have expended, but the condition implied is that B, D, and E, inasmuch as they have paid A for C's debt, will look to C to pay first, and, if C does not pay, then they will look to A. This is the practical aspect of the theory of acceptance. To put it in a still more elementary way, A may be deemed to propose to C in these words: "Will you pay what you owe me, or the money you hold for me, to any one I choose." C assents to this as soon as he accepts.

It follows that the drawee, until acceptance, is a stranger to the bill. In *Swope v. Ross*<sup>1</sup> the drawee, who had not

<sup>1</sup> *Swope v. Ross*, 40 Pa. St. 186.

accepted a bill, discounted it before maturity, and the argument was that, in thus cashing it, he had paid it. But the court said it was neither acceptance nor was it payment, unless such was the express intention of the parties. So that if a drawee receives and discounts a bill for the drawer, and then discounts it away, the drawer, and not the acceptor, is the person who must ultimately pay the bill.<sup>2</sup> But the drawee, upon acceptance, in the order of liability, becomes the principal debtor. He is precisely like the maker of a promissory note. This means that all parties may look to him to pay the instrument; that no demand need be made of him; that notice of dishonor to him is unnecessary, —all of which are privileges of moment in business affairs.<sup>3</sup> The New York cases are *Foden v. Sharp*<sup>4</sup> and *Wolcott v. Van Santvoord*.<sup>5</sup>

With these shifts of liability on the part of the drawee before and after acceptance, there is a corresponding change of liability on the part of the drawer. If the drawee refuses to accept, the drawer must fall back upon their original relation for his remedy. If it was an old debt, as in the case we put, he must sue on the indebtedness. If the drawee had deposited funds, he must demand them, and, on refusal, sue in tort or for conversion. In such a case, too, as we have already shown, all prior parties must look to the drawer to be repaid the moneys they have expended on taking the bill. The drawer remains, as he must be at all times, the principal debtor on the bill. On the other hand, upon acceptance the drawer is relieved from primary lia-

<sup>2</sup> *Chapman v. White*, 6 N. Y. 412; *Winter v. Drury*, 5 N. Y. 525; *Duncan v. Berlin*, 60 N. Y. 151.

<sup>3</sup> *Wallace v. McConnell*, 13 Pet. 136, which contains cases on this point.

<sup>4</sup> *Foden v. Sharp*, 4 Johns. 183.

<sup>5</sup> *Wolcott v. Van Santvoord*, 17 Johns. 247.



bility upon the bill, and stands as to the other parties to the instrument in a relation somewhat akin to a guarantor, or, as it is accurately put, in the position of first indorser. He is liable to pay the bill if the acceptor does not. A glance at the example will show the fairness of this. A received from B cash for a debt C promised to pay; B received cash from D; and D from E. If C fails in his promise, the cash received should be refunded in the order it was paid. This would leave the controversy as it ought to be between C and A.

### Requisites of Acceptance.

56. The following are the requisites of a valid acceptance:

- (a) The acceptance is an assent to the request of the drawer; hence must be according to the tenor of the bill.
- (b) It must be by the drawee.
- (c) An acceptance is probably complete only upon delivery.

### Varieties of Acceptance.

57. The following are varieties of acceptances:

- (a) Expressed in words of the drawee, or express acceptance.
- (b) Implied from acts of the drawee, or constructive acceptance.
- (c) In writing on the bill itself.
- (d) In writing on a separate paper.
- (e) Acceptance for honor or supra protest.

### Acceptance According to Tenor.

58. The acceptance must be absolute and according to the tenor of the bill to bind all the parties to it.

59. **THE TENOR OF THE BILL**—Is the request in the bill to pay the money at the time and place and in the manner mentioned in it. A change in the acceptance in any one of these respects renders the acceptance qualified. If the payment of the bill by the acceptor is made dependent on a condition, it is conditional.

60. A qualified acceptance is only valid—

- (a) As to all parties subsequent to the acceptance.
- (b) As to all prior parties who, upon due notice, assent.

As we have seen under § 55, the bill before acceptance is in kind something like the offer of the ordinary contract. The acceptance is the assent of the drawee to the terms of the bill. Hence the general principle that, for an instrument or an act to be an acceptance, it must be according to the tenor of the bill as defined by § 59. The reasons for this, so far as they relate to partial acceptance, have been put in a most thorough way in *Wegersloff v. Keene*.<sup>6</sup> Summarized, they are that, if a bill be accepted for only part of the sum called for in it, it would result in splitting up the right of action on the bill, part being chargeable to the acceptor, and part to the drawer; it would necessitate a partial protest for non-acceptance and for non-payment; and lastly, on payment, the drawee would be entitled

<sup>6</sup> *Wegersloff v. Keene*, 1 Strange, 214.

to demand the possession of the bill, and his possession of it would be presumptive evidence of the payment of the whole bill, though he has in fact paid only part of it. These, of course, are grave reasons against such an instrument acting as a circulating medium.

Equally grave business objections exist against modifying the assent to the bill, as to the time, place, or manner of its payment, or making its payment conditional. Thus if, in the illustration under § 1, the bill was a 6-months bill, and B, D, and E were indorsers upon it, and the bill were payable in Jamaica, B, D, and E, as indorsers, might make all their calculations to pay the money at that time and place if C, the acceptor, did not. It would therefore be an injustice and hardship to B, D, and E if C were to accept the bill in three months, and pay at London, England, because, if C did not pay at that time and place, the holder might sue B, D, and E, who had every right to expect that they would not be called upon to pay until after the expiration of 6 months, and then at Jamaica.

The reason of the foregoing principle is to protect the other parties to the bill who act as sureties or guarantors. Not that such acceptances as I have specified are in themselves bad. They promise to pay the bill. They create contract rights upon the same consideration that the ordinary acceptance does. But they change the position of the sureties; hence, taking all things into consideration, it is wiser to disallow than to allow them. The test whether an acceptance is according to the tenor of the bill or not is whether it amounts to a material alteration of its terms, and, this being the case, it follows that, if the parties know and assent to the change of the conditions of the instrument after a modified acceptance has been given, the instrument is still binding upon all parties who have such knowledge and give their assent to the instrument. Parties subse-

quent to the modified acceptance are, of course, bound by it. Parties prior to it, who know of it, and assent to it, are upon the same principle bound. The point whether an acceptance is according to the tenor of the bill—i. e. whether it changes in some material respect the terms of the bill and the relations of the parties—is well brought out in *Niagara Dist. Bank v. Fairman Co.*<sup>7</sup> and *Troy Bank v. Lanman.*<sup>8</sup> In the first case the draft was addressed to Cobourg, and accepted payable at Port Hope, a town some miles distant. In the second, the bill was drawn payable in New York generally, and accepted payable “at Continental Bank, New York.” In this last case the fixing or designating a specific place in the city to which the bill was addressed was no hardship,—no material change; while compelling an indorser to be ready at some distant place was a hardship and a material change.

### Who may Accept.

**61.** The only person permitted by the law merchant to be an acceptor is the person to whom the bill is addressed. Another person is liable only upon a collateral undertaking.

#### **EXCEPTION—An acceptor for honor.**

Note—An acceptance may be made by an authorized agent.

Note—If a bill is drawn on two persons jointly, both should accept, though, if one accepts, he is liable.

The arbitrary custom of merchants is said by the courts to be the reason of this rule. Though it is not the language

<sup>7</sup> *Niagara Dist. Bank v. Fairman & W. Mach. Tool Manuf'g Co.*, 31 Barb. 403.

<sup>8</sup> *Troy City Bank v. Lanman*, 19 N. Y. 477.



of the courts, yet it so coincides with the fundamental theory of contracts that we add as an additional reason that no person other than the drawee can be acceptor, because such a person would be in a measure a stranger to the contract. He is not, as appears from the face of the instrument, indebted to, nor has he funds of, the drawer. It is true, his intention may have been to signify to the parties to the bill that he was willing to pay and would pay the instrument. But he was not the person to whom the proposition or on whom the order was made. He was not a party to the contract. If the courts were to treat him as an acceptor, they would make a contract for the drawer with a party with whom, as far as it can be gathered from the bill, the drawer had no intention of contracting. This, though somewhat vaguely stated, seems to be the underlying principle in *Walker v. Bank of State of New York*.<sup>9</sup> In that case the bill was addressed to Mr. E. C. Hamilton, of New York, and was "accepted payable at American Ex. Bank. [Signed] Empire Mills. By E. C. Hamilton, Treas." The question was whether this was an acceptance, and the court said this was an acceptance of the Empire Mills, not a party to the contract. This point is brought out more clearly in some of the English cases. In *Jackson v. Hudson*<sup>10</sup> a bill was addressed to Mr. I. Irving, and accepted, "I. Irving. Joseph Hudson." This was a case for sale of goods to Irving. Hudson accepted, by way of making the acceptance doubly sure. But Lord Ellenborough said Hudson's undertaking was a collateral one. It was meant to be a guaranty, and not an acceptance.<sup>11</sup> This rule is subject to an exception to which

<sup>9</sup> *Walker v. Bank of State of New York*, 9 N. Y. (5 Seld.) 582.

<sup>10</sup> *Jackson v. Hudson*, 2 Camp. 447.

<sup>11</sup> *Davis v. Clarke*, 6 Q. B. 16.

we have before called attention.<sup>12</sup> We have seen that if it were clear to whom the bill is meant to be addressed, and the acceptance is made by such a person, then the acceptance is sufficient. This is based upon the case of *Gray v. Milner*,<sup>13</sup> where an instrument was addressed "Payable at No. 1 Wilmot St.," and the words "Accepted, Charles Milner," were treated as a proper acceptance, because such an address could only mean the person residing there. This rule has been followed in this country, and it is now probably the law. A draft may be accepted by some drawee other than the one named, provided in the draft there was a misnomer as to the drawee and it was accepted by the person to whom it was intended to be addressed.<sup>14</sup> The acceptor for honor—a branch of this subject to be discussed later on—is also a modification of this rule.

### Delivery.

#### **62. An acceptance is probably complete only upon delivery.**

Note—Upon this point, there is confusion. The doctrines are:

(a) *Contra*. The delivery of a bill or note is necessary only for the purpose of transferring title. An acceptance has no effect upon title, and is therefore complete the moment it is written upon the bill *animo contrahendi*.

(b) *Pro*. That the writing of an acceptance on a bill is not a binding act, but the communication of it to the holder by some act manifesting an intention to be bound is, pending which the holder is in the position of one presenting a bill, and in no worse situation by its cancellation or revocation than before.

<sup>12</sup> *Supra*, p. 48.

<sup>13</sup> *Gray v. Milner*, 8 Taunt. 739.

<sup>14</sup> *Hascall v. Life Ass'n*, 5 Hun, 151.

### Forms and Varieties of Acceptance.

63. An acceptance, if in writing, is constituted by words not putting a direct negative upon the order contained in the bill. The question is whether an intention to accept can be construed from the words.

64. An acceptance, if verbal, is constituted by any words which evidence such intention clearly and unequivocally, if they be addressed to the drawer or holder, and he waive his right to a written acceptance.

The foregoing principal text shows the form and varieties of acceptances. They are acceptances expressed in written or spoken words, as contrasted with each other and also with acceptances implied from merely the conduct of the drawee. Another variety of the general class is caused by its being written on a separate piece of paper; and a third, by its being issued as a written, spoken, and implied acceptance before or after the issuing of the bill. It is our purpose to first show the underlying theory of an acceptance, and then to show the forms and general principles required for an acceptance by the law merchant.

As has been said, the acceptance is the assent of the drawee to the proposition of the drawer. The question, then, is, what, under the law merchant, will be deemed an evidence of such assent. There are three general classes based upon the divisions we have given above: Acceptances in writing, acceptances by parol, and acceptances implied from conduct.

If in writing, the courts, according to Judge Cowen,<sup>15</sup>

<sup>15</sup> *Spear v. Pratt*, 2 Hill, 582.

go to the length of saying that any form of words which do not in themselves negative the request of the bill shall be treated as a valid acceptance of it. Under the common law, neither the word "Accepted" nor the signature of the acceptor is necessary. The unsigned words "Seen," "Accepted," "Presented," "Honored," or merely the name of the drawee, or "I will pay this bill," are sufficient acceptances, and evidence the fact merely that the drawee has seen the bill, and does not dissent from it. In many jurisdictions written acceptances are required. In New York the statute is to this effect:<sup>16</sup> "No person shall be charged as an acceptor unless his acceptance shall be in writing;" meaning, according to the interpretation of numerous cases, that an acceptance is sufficient if it be the name of the acceptor alone. This complies with the regulation that the acceptance shall be in writing and be signed. On the other hand, in *Luff v. Pope*,<sup>17</sup> a parol promise is expressly declared insufficient as an acceptance to a negotiable bill of exchange, though a sufficient assent to a non-negotiable one. It is to be noted that section 9 of the same statute provides that every holder of a bill, presenting the same for acceptance, may require the acceptance to be written on the bill. A refusal to comply shall be deemed a refusal to accept, and the bill may be protested.

In jurisdictions where acceptances are not required to be in writing, or the statutes do not otherwise modify the common law, parol acceptances are permitted. A parol acceptance is any form of words used by the drawer or holder which by reasonable intendment can be made to signify that he honors the bill. There are some limitations to this rule. These words are to be addressed to the drawer or

<sup>16</sup> Rev. St. N. Y. (8th Ed.) p. 2499, § 6.

<sup>17</sup> *Luff v. Pope*, 5 Hill, 413.



holder. They must be assented to by the holder. They must relate to an existing bill, for, if they pertain to a future bill, they will not be deemed an acceptance. They must be unequivocal, for, if they are equivocal, they will not be deemed an acceptance. In such expressions as "Your bill shall have attention," "I will pay the bill, but I cannot now," "I will give you a bill at three months," there is no distinct, definite promise or agreement to pay the bill. They were consequently deemed by the court too uncertain to be treated as acceptances. The point to be determined is whether, by a reasonable construction, the words used will show that the acceptor recognized an immediate obligation on the part of the drawee upon him, assented to it, and declared himself bound to the payment of it as evidenced by the bill. Keeping in mind the expressions we have quoted, contrast them with such expressions as those used by the drawee in a case where a foreign bill had been protested for non-acceptance, and the drawee said, "If the bill comes back, I will pay it;" or in another case, where the drawee said, "Leave your bill with me, and I will accept,"—both of which expressions were held to be sufficient acceptances. In these last expressions there was a distinct promise to honor the bill. It is probably the case that, when verbal acceptances are permitted, they will at the present day be construed with extreme strictness. It is undoubtedly the common law that they are allowable. But it is also equally true that they are not in accord with the true theory of negotiability. A bill of exchange should have all its indicia upon its face. And this rule, with every other that contravenes it, complicates business operations, and clogs the circulation of an instrument as a medium of payment.

### Implied Acceptance.

**65. AN IMPLIED ACCEPTANCE**—Is any act which clearly indicates an intention to comply with the request of the drawer, or any conduct of the drawee from which the holder is justified in drawing the conclusion that the drawer intended to accept the bill, and intended to be so understood.

A constructive or implied acceptance is equally open to these objections,\* though the doctrine of constructive or implied acceptance is in itself consistent with justice. Its limits are not exactly defined. It arises where there is deliberation for a long time contrary to the usage of the parties. Where, however, the detention is not contrary to the usual dealings between the parties, or is due to the fact that the holder failed to call for it, the doctrine does not apply. Destruction of the bill, when the act is tortious because it amounts to an appropriation or conversion of the bill, is also a constructive acceptance. The reason of this theory is that when a bill, in the ordinary course of business, is left with the acceptor, he is to consider whether he will accept or return it. If he, without saying, retains it in his hands, the law then presumes that he has done that for which the bill was left, and which is for the benefit of the party leaving the bill; that is, that he has accepted it. This is the rule of business duty as announced by the court in *Jeune v. Ward*.<sup>18</sup> Probably, however, the rule at present would be, that when a bill is so left, it would be deemed the duty of the party who left it to call for it again, and to in-

<sup>17</sup> See p. 81.

<sup>18</sup> *Jeune v. Ward*, 1 Barn. & Ald. 653; *Harvey v. Martin*, 1 Camp. 425.

quire whether it had been accepted or not, unless such was contrary to the usual dealings between the parties. However that may be, the reason of the rule is plain. It is that the holder shall not be deprived of his right to hold the drawee as an acceptor where the drawee by his delay or wrongful act might injure the holder, perhaps put him in a worse position so far as his rights against prior parties are concerned.<sup>19</sup>

### Acceptance in Writing.

66. Some jurisdictions require an acceptance to be in writing, and signed by the acceptor or his agent.

Note—This acceptance may be made—

- (a) Before signature by drawer.
- (b) After bill is overdue.
- (c) After it has been dishonored by a previous refusal to accept it, or by non-payment followed by protest.

### Acceptance on Separate Paper.

67. If the bill is in existence, for the convenience of business the acceptance may be on a separate paper, but the promise must be clear and unequivocal.

68. If the bill is not in existence, for the convenience of business the acceptance may be on a separate paper. Its elements are:

- (a) That the contemplated drawee shall, in a letter describing the bill to be drawn, promise to accept it.

<sup>19</sup> Dunavan v. Flynn, 118 Mass. 537; Pierce v. Kittredge, 115 Mass. 374; Storer v. Logan, 9 Mass. 55, 60.

- (b) That the bill shall be drawn in a reasonable time after the letter is written.
- (c) That the holder shall take the bill upon the credit of the letter.

Acceptances not written on the bill are of two classes: Those referring to a bill in existence at the time of the acceptance; and those referring to a bill yet to be drawn, and promising to accept it when drawn. Theoretically, as forcibly pointed out by Professor Ames, these acceptances are in defiance of the general principles of the law merchant. By this creation of the law, one indorser who does not see the outside acceptance has no remedy against the acceptor, while his immediate indorsee, who sees and discounts the bill on the faith of the promise, has a remedy his prior indorser had not. As a business expedient, the reasons in their support are stated by Chief Justice Marshall.<sup>20</sup> "The great motive," he said, "for construing a promise to accept as an acceptance, is that it gives credit to the bill, and may induce a third person to take it. If the promise be not known, \* \* \* it can give no credit to the bill; if it be known, an absolute promise to accept will give all the credits to the bill which a full confidence that it will be accepted can give it. \* \* \* As Lord Mansfield said, if one man makes an absolute promise to accept his bill, the drawee or any other person may show it upon the exchange to get credit. Thus, the promise, when shown, gives the credit; the merchant who makes it is bound by it; \* \* \* and this, too, is given as well by a letter written before the bill as one written afterwards." His decision then closes with the declaration "that a letter written within a reasonable time before or after the date of a bill of ex-

<sup>20</sup> Coolidge v. Payson, 2 Wheat. 66.



change, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who afterwards takes the bill on the credit of the letter, a virtual acceptance, binding on the person who makes the promise." The reasons for this rule are twofold. One is the practical one that, without it, much embarrassment would be thrown in the way of commercial transactions. A knowledge that a draft will be accepted is often of the utmost importance to the drawer in assisting the negotiation of bills of exchange; and, if the promisor was not bound by what he had written, extensive frauds might be perpetrated. The practical view which the courts take is that the rule would prevent these frauds, and accommodate the mercantile transactions of the country.<sup>21</sup> The other rule was based in its origin upon the great authority of Lord Mansfield in England,<sup>22</sup> supported in the United States by the opinion of Chief Justice Kent,<sup>23</sup> that if the collateral acceptance be shown to a third person, so as to excite credit, and to induce him to advance money on the bill, such third person ought not to suffer by the confidence excited. And these two reasons have generally prevailed over the strongest objection and severest criticism of its opponents, so that it is at present established law. It is the credit which such acceptance or engagement to accept has given to the bill which gives to it its binding operation.<sup>24</sup>

In the early stages of the growth of the theory, there was a distinction attempted to be drawn between acceptances or promises to accept existing bills and promises to accept bills to be drawn within a reasonable time in the future. This is a distinction without a substantial difference, but

<sup>21</sup> *Greele v. Parker*, 5 Wend. 414.

<sup>22</sup> *Pillans v. Van Mierop*, 3 Burrows, 1663; afterwards overruled in *Johnson v. Collings*, 1 East, 98, and *Pierson v. Dunlop*, Cowp. 573.

<sup>23</sup> *McEvers v. Mason*, 10 Johns. 206.

<sup>24</sup> *Thompson, C. J.*, in *Goodrich v. Gordon*, 15 Johns. 6.

traces of it are found everywhere. The enactments of the New York statutes which are declarative of the general law are such. The statute enacts:<sup>25</sup> "Sec. 7. If an acceptance be written on paper other than the bill, it shall not bind the acceptor, except in favor of a person to whom such acceptance shall have been shown, and who on the faith thereof shall have received the bill for a valuable consideration. Sec. 8. An unconditional promise in writing to accept a bill before it is drawn shall be deemed an actual acceptance in favor of every person who upon the faith thereof shall have received the bill for a valuable consideration." This distinction lies rather in words than in principle, for throughout both classes run these three principles: (1) In order to make this extrinsic promise, an acceptance credit must be given to it; (2) like every other promise or contract, its subject-matter must be definite or reasonably so; and (3) the promise must not be a nudum pactum, i. e. it must be upon a consideration, or, to express it as it commonly occurs in business transactions, the holder or person claiming the benefit of the promise must have discounted the bill upon the promise.

These principles exclude from the operation of the rule cases where the indorsee has taken the bill in entire ignorance of the promise, or where the promise is made to some person, not the drawer of the bill, and made with no intention of its being shown as a means of exciting credit.<sup>26</sup> In such cases the promisor is exempted.

There remains but one more question to be answered, and that is how definitely must the letter describe the draft to be binding in law as an acceptance of it. The letter need not be an agreement in terms to honor the draft. It may be read in the light of the surrounding circumstances,

<sup>25</sup> Rev. St. N. Y. (8th Ed.) pp. 2499, 2500.

<sup>26</sup> Grant v. Hunt, 1 C. B. 44.

which may be used by the court to aid in ascertaining its purpose, and in applying and interpreting its language. The absence of technical promissory words is of no practical moment where the language employed is such as to raise an imperative legal obligation.<sup>27</sup> It need not contain a particular description or identification of the bill to be drawn. It is enough if it can be shown that the bill was drawn in pursuance of the authority to that effect. And it is safe to say from an examination of the authorities that in general all that is wanted is a general power to draw and a reasonable intendment; i. e. a statement of facts from which a man of ordinary prudence would infer that the power related to the bill which is offered for discount upon the supposed acceptance. If this appears, it is sufficient for the purposes of creating an acceptance.

### Parol Acceptance of Future Bill.

**69.** In the absence of statutory intervention, it is probably the common-law rule that an unequivocal parol promise to accept a specific future bill is binding if the bill is taken by the holder upon the faith and credit of such promise.

Note—This doctrine of parol acceptance is to be received with extreme caution. It is contrary to the theory of negotiability, and to the general policy of law, because the evidence necessary to prove such an acceptance is in most cases likely to be questionable.

Note—In some jurisdictions it is questioned whether a parol acceptance is not avoided by the statute of frauds, in many cases the acceptance being merely a promise to pay the debt of another; but the better opinion seems to be that contracts based upon the law merchant are in general excepted from the operations of the statute of frauds.

<sup>27</sup> *Barney v. Worthington*, 37 N. Y. 112; *Bank of Michigan v. Ely*, 17 Wend. 508, 512; *Ulster County Bank v. McFarlan*, 5 Hill, 432.

### Acceptance for Honor or Supra Protest.

**70. DEFINITION**—An acceptance supra protest is an undertaking by a stranger to the bill, after protest, for the benefit of all parties subsequent to him for whose honor it is made, and conditioned to pay the bill when it becomes due if the original drawee does not.

**71. METHOD**—The acceptor for honor appears before a notary public and witnesses, and declares he accepts such protested bill for the honor of some party to it. He subscribes his name to the words "Accepts S. P." He then notifies the party for whose honor acceptance is made.

Note—There may be several successive acceptors supra protest for the honor of different parties to the bill.

Note—An acceptance supra protest may be at any time between protest and the maturity of the bill.

Note—It is optional with the holder to take or refuse an acceptance supra protest.

Note—An acceptance supra protest may be for part of the sum named in the bill.

**72. An acceptance supra protest may be made—**

(a) **After dishonor by non-acceptance.**

(b) **After protest for better security after acceptance.**

Note—This last species of protest is used when the acceptor absconds or becomes insolvent. In such case the holder notifies the drawer and indorsers. Its purpose seems to be only to inform them of the improbability of payment by the acceptor, so that they may take steps to provide for the payment of the bill when due.



## PROBLEMS.

(1) Bill addressed to B. X writes an acceptance on it. Is X an acceptor?

(2) B accepts a bill drawn on him, "on condition that it be renewed," for six months. Is this valid?

(3) A draws a bill on B for \$100. B accepts it as to \$50. Is this a good acceptance?

(4) A says to B, his clerk, on presentation of C's bill, "I must accept and pay that bill." Is this an acceptance?

(5) Letter of A to B: "Your bill is received, and will have attention." Is this an acceptance?

(6) B telegraphs to A, "I have no objections to accepting for you at 3 or 4 months for \$2,500." A bill for \$2,500 at 4 months is drawn in pursuance of the authority. Is B liable as acceptor?

(7) Bill addressed to "B, of N. Y. city," is accepted payable at Albany, N. Y. Is this a general or a qualified acceptance?

(8) A draws a bill on B for \$100. B accepts it, payable half in money, half in goods. Is this valid?

(9) A bill is addressed to B and X. B alone accepts. Is he liable as acceptor?

(10) B promises C to accept a bill to be drawn by A in his favor. D discounts the bill so drawn, on the faith of B's promise to C to accept. B subsequently refuses to accept. Can D hold B as acceptor?

(11) B writes thereon, "I take notice of the above," and signs his name. Is this an acceptance?

(12) Bill addressed to "B, of N. Y. city," is accepted payable at the X Bank, N. Y. city. Is this a general or a qualified acceptance?

(13) A draws a bill on B. When presented by the holder for acceptance, B refuses to write anything on the bill, but says, "The bill is correct, and shall be paid." Is this an acceptance?

(14) B writes to A, "I authorize you to draw on me at ninety days, from time to time, for such amounts as you

may require, whole amount not to exceed \$3,000." A bill is drawn in pursuance of the authority given. Will B in such case be liable as acceptor?

(15) Drawee says of a bill, "I will pay it, but I cannot now." Is this an acceptance? Drawee says of a bill, "I will give you a bill at three months." Is this an acceptance?

(16) A draws a bill on B. B writes thereon the word "Accepted," "Presented," "Seen," "Honored," or merely his name. Were these acceptances?

(17) B writes on the back of a bill, "I will see the within paid eventually." Was this an acceptance of it?

(18) B writes on the back of a bill an order to X to pay the within. Was this an acceptance of it?

(19) A and B having an open account, an adjustment takes place between B and an agent of A, and the balance found due is paid over to the agent. A expresses dissatisfaction, whereupon B writes him, "Reperuse the account, make out a statement to suit yourself, and draw on me for the balance, which shall be duly honored." Would this be an acceptance of a bill so drawn?

(20) Bill addressed to the "Directors of the B Company." The acceptance is signed by two directors and the manager. Is the manager an acceptor?

(21) A draws a bill on B, payable two months after date. B accepts it, payable six months after date. What is your opinion of this?

## CHAPTER IV.

### INDORSEMENT.

- 73. Definition.
- 74. Place on Instrument.
- 75. Allonge.
- 76. Name of Holder.
- 77. Form of Words.
- 78. Delivery.
- 79-81. Indorsement in Blank.
- 82-83. Indorsement in Full.
- 84-88. Indorsement without Recourse, Conditional and Restrictive Indorsement.
- 89. Nature of Indorsement.
- 90-91. Requisites of Indorsement.
- 92-93. Anomalous Indorsements.

#### Definition.

**73. INDORSEMENT**—Is the writing of the name of the holder on the instrument with the intent either to transfer the title to the same or to strengthen the security of the holder by assuming a contingent liability for its future payment, or both. It strictly applies only to negotiable instruments.

Indorsements are classed by themselves as a distinct body of contract rights and liabilities. It is not wholly accurate to say that an indorsement is a distinct contract; yet the indorser and indorsee stand apart in liability from the maker and acceptor. Indorsement has its origin in the theory of negotiability and practical use in the circulation of bills and notes. In the illustration under § 1, which we have

so often referred to, B pays A £1,000, and indorses the bill to him; D pays B £1,000, and B indorses the bill to him; and E pays D £1,000, and D indorses the bill to him. In each instance B, D, and E get what for their purposes is as good and better than £1,000 in gold would have been. And, in turn, as A, B, or E was paid the £1,000, and indorsed the bill, he assumed some liability; he did all he could to assure the indorsee, who paid the £1,000 to him, that he in turn would get his money. He said to the payor: "You give me £1,000 in gold, which cannot be transported because of its weight, or £1,000 in bank notes, which are inconvenient to carry because of their danger of being lost, and I will give you a claim payable to you alone, and which at New York or Charleston or Jamaica will be just as good to you as the £1,000 in gold or bank notes would have been. You may safely take this, because if C does not accept or pay this, or A does not pay this as drawer, I, to whom you have paid the £1,000, will repay it to you." "A payee or subsequent holder," says Professor Ames, "instead of holding a bill and collecting it at maturity, may wish to transfer his interest in it to another, in which case he indorses the bill. He writes and signs upon the back of the bill an order directing its payment to the desired transferee. The order is written with mercantile conciseness, e. g.: 'Pay A. [Signed] X,'—the other terms being contained upon the face of the bill. The custom of merchants has attached to this order a liability similar to that which attaches to the order of the drawer. By an indorsement, therefore, a party not only passes his interest in the bill to another, but also pledges his credit for the honor of the bill. In other words, an indorsement is at once a transfer and a contract."

The student must fully grasp this idea,—that the indorsement is a contract, and a contract to which the law mer-



chant and the common law have appended very peculiar conditions. It is a contract something in the nature of a guaranty, something in the nature of a warranty, and to the liability under which the laws have attached the very unusual conditions of presentment, demand, and notice of dishonor. It is, to be sure, an evidence of a transfer of title, but it is principally a development of a form of contract at the hands of the creators of the body of rules of the law merchant. We may be pardoned in referring again to the illustrations under §§ 11, 12, and 14. In these instances the drawer or maker contracted to pay "John Smith, or his order," meaning John Smith, or some person to whom John Smith especially directed, should be paid the sums of money called for in the instruments. The only construction of this would be that John Smith must direct payment. He must direct it in writing. Until he does so direct it, and evidences this direction by writing it on the instrument, the title to the instrument, and the right to the sum of money called for by its terms, remain in him. But, when he does direct it by indorsing it, that (under the law merchant) shows to all the world that John Smith has signified his wish that it should be paid to some person. This wish he may signify in a variety of ways. These ways, and what is meant in law by each of them when it is adopted, is set forth in the principal text. They are the indorsements in blank and in full, the conditional and restrictive indorsement, and the indorsement without recourse.

### Place on Instrument.

**74. The indorsement, though usually on the back of the instrument, is valid on the face of the bill.**

### Allonge.

75. The indorsement must be somewhere on the instrument, but when, by reason of rapid circulation, the back of the instrument becomes filled with indorsements, the law merchant permits the holder to paste on a slip of paper for his own and subsequent indorsements. This is called an allonge.

### Name of Holder.

76. The usual method of indorsement is by the full name of the holder, but any emblem of that name will suffice.

### Form of Words.

77. Any form of words with the signature from which the intent of the holder may be gathered is a sufficient indorsement.

### Delivery.

78. With negotiable instruments the term "indorsement" comprehends delivery for a consideration. An indorsement is not complete without a delivery for a consideration.

### Indorsement in Blank.

79. **AN INDORSEMENT IN BLANK** — Means that the instrument is to be paid to whomsoever may hold it. There may be successive indorsements in blank.

80. The indorsee in blank, or any subsequent bona fide holder, may write over an indorsement in blank any contract consistent with the character of the indorsement.

81. Any holder may convert a blank indorsement into a special indorsement without thereby incurring the liabilities of an indorser.

An indorsement in blank is in form the writing merely the name of the payee or indorser upon the back of the instrument. Thus, if John Smith, in the illustration just mentioned, indorsed the instrument in blank, he would write simply "John Smith" on the back of it. How the courts have interpreted this appears from *Peacock v. Rhodes*,<sup>1</sup> *Grant v. Vaughan*,<sup>2</sup> and *Miller v. Race*,<sup>3</sup> which have been generally adopted as the law.

*Peacock v. Rhodes* was a case of a bill indorsed in blank by the payee to a third person, and stolen from the third person, and received by a bona fide purchaser for value. Lord Mansfield said, "There is no difference between a note indorsed in blank and one payable to bearer;" and it was deemed that such a bill was to be treated as so much cash, unless the payee chooses by a specific indorsement to some person to restrain its currency. The court construed the contract to mean that the payee might follow out the contract embodied in the bill, "Pay to John Smith, or such person as he directs," and that, when he so indorsed, he was deemed to say, "You may pay to any one who holds the bill." In *Grant v. Vaughan*, *Vaughan*, the maker of a note to bearer, was sued by *Grant*, who gave value for the note

<sup>1</sup> *Peacock v. Rhodes*, 2 Doug. 633.

<sup>2</sup> *Grant v. Vaughan*, 3 Burrows, 1516.

<sup>3</sup> *Miller v. Race*, 1 Burrows, 452.

to a person who had found it, and who had no right to it. It was contended that Grant could only recover from the person from whom he got the note. But the court construed the contract of Vaughan otherwise. *Miller v. Race* is very much like this last case, only that the instrument was stolen from the lawful owner. In these cases the law goes to the limit that the true owner cannot recover in trover from the bona fide holder.

The student must keep in mind that this relates only to an instrument held by a bona fide holder. Where the instrument is not in the possession of a bona fide holder, but of the finder or the thief, this extreme rule does not apply. The instrument is, then, like all other property. It cannot be enforced by the wrongful holder. But, when once it is in the hands of the bona fide holder, then it is treated as money in the ordinary course and transaction of business. On account of its currency, it cannot be recovered after it has passed in currency. So in case of money and of paper indorsed in blank, which has been stolen or found, the true owner cannot recover after it has been paid away fairly and honestly upon a valuable consideration, because it is necessary for the purposes of commerce that its currency should be established and secured.

Very much like this general power, vested in the payee or subsequent indorser, to vest any lawful holder with the power to enforce the payment of the instrument, is the power conferred upon the indorsee in blank to write over the indorsement any contract consistent with the character of the instrument. The authority followed in most jurisdictions is *Russell v. Langstaffe*.<sup>4</sup> There the defendant indorsed his name in blank on five copper-plate notes, the body of the notes being at that time not filled out. Upon the

<sup>4</sup> *Russell v. Langstaffe*, 2 Doug. 514.



trial on behalf of the defendant, it was urged that, because these notes were blank at the time of the indorsement, they were not promissory notes; and that no subsequent act could alter the original nature or operation of the defendant's signature, which, when written, was a mere nullity. Lord Mansfield, in deciding the case, used these often-quoted words: "The indorsement on a blank note is a letter of credit for an indefinite sum." The defendant said: "Trust Galley to any amount, and I will be his security." The amount of the main instrument being left blank, an authority to fill it in for any sum was implied. The terms of the body of the note or bill are the principal terms of the contract of indorsement, and nothing inconsistent with these can be implied from the indorsement. Judge Cowen, in *Dean v. Hall*,<sup>5</sup> said: "The holder may put the blank paper in any form which shall accord with the intent of the names, either as makers, drawers, payees, or indorsers. This power of the bona fide holder depends upon the intent of the parties not written out in full, but evinced by the character of the slip on which the name appears." And so an indorsement in blank signifies not only that it was the payee's or subsequent indorser's mind and wish that the money called for in the instrument should be paid by the maker or acceptor to whomsoever should lawfully have it in his possession, but also that over such indorsement—which may be treated in itself as a blank general power—a subsequent holder might write any modification of the instrument which was not inconsistent nor a material alteration of its terms. He may not write over a blank indorsement a waiver of demand and notice; or he may not change such an indorsement into a guaranty. He cannot split up the bill, making part of the sum called for in it

<sup>5</sup> *Dean v. Hall*, 17 Wend. 214.

payable to one person, and part payable to another. All these change the terms of the contract as they are implied in law. But, if there are successive indorsements in blank, the holder may fill up the first to himself, or he may deduce his title through all, or he may strike any or all, or he may turn the instrument over to a stranger without indorsement by himself; for all of these instances in no wise change the tenor of the main instrument, or effect an alteration in the letter or the spirit of its terms.

### Indorsement in Full.

**82. AN INDORSEMENT IN FULL**—Means that none but the indorsee or the person to whom the bill or note is ordered paid can demand its payment, and that only the indorsee in full can transfer the instrument by adding his own indorsement.

**83.** An instrument which is originally payable to bearer, or which has been indorsed in blank, though afterwards indorsed in full, is still payable to bearer; except as to the special indorser, who, on such an instrument, after such an indorsement, is only liable on his indorsement to such parties as make title through it.

An indorsement in full is in form commonly in this wise: If it were by John Smith, the payee in the illustration under §§ 11, 12, and 14, it would be, "Pay to the order of John Jones," or "Pay to John Jones, or order," or simply "Pay John Jones." While the indorsement in full, or the special indorsement as it is indifferently called, must name the indorsee, the indorsement need not necessarily be in words negotiable. It may be either "Pay to John Jones," or "Pay

to the order of John Jones." In either case John Jones may negotiate the note away. This is because the original instrument was negotiable. It contemplated the passing from hand to hand. Hence, in the illustration, John Smith, the payee, may direct that the instrument be paid to John Jones, and John Jones, upon delivery, being the owner, may direct that it be paid to Thomas Robinson, and the maker must pay to Thomas Robinson, or to John Jones, or to John Smith; so, also, must John Jones pay to Robinson, because Robinson has a right of action against Jones, and Jones against Smith; hence Robinson has also a right of action against Smith.<sup>6</sup>

But, when an instrument is specially indorsed, title can only be transferred from the indorsee by his indorsement. In the very outset, this principle must be sharply contrasted with the principle I have just alluded to as established by *Grant v. Vaughan* and *Miller v. Race* (*supra*, pp. 95, 96.) With notes payable to bearer or indorsed in blank, the holder is presumed to be the owner. Possession and title are one and the same thing, and this though the party possessing it is in no wise a party to the instrument. But as appears from *Colson v. Arnot*,<sup>7</sup> where the direction in the contract is to pay specially to some person, that person and no other can direct that the money is to be paid in its turn. No other person can personate this indorsee, and by forgery satisfy the conditions of this contract. And it does not avail even that the bill is paid under a forged indorsement. Such payment or transfer was not in contemplation of the contract, and is utterly void.<sup>8</sup>

<sup>6</sup> *Leavitt v. Putnam*, 3 N. Y. (3 Comst.) 494.

<sup>7</sup> *Colson v. Arnot*, 57 N. Y. 253.

<sup>8</sup> *Graves v. American Exch. Bank*, 17 N. Y. 205.



In case of the combination of the two classes,—indorsements in blank and in full,—the application of the rules is somewhat confusing to the student. For example, let us assume that there are indorsed upon an instrument some blank indorsements, then some special indorsements, and after these again some indorsements in blank. The special indorser will be liable only to those with whom he has contracted by name. Suppose the following to be a series of indorsements: (1) John Smith. (2) Pay to the order of Thomas Robinson. Richard Roe. (3) Thomas Robinson. In such cases the rule is laid down in *Watervliet Bank v. White*,<sup>9</sup> and *Pentz v. Winterbottom*.<sup>10</sup> In the *Watervliet Bank Case*, the suit was upon a promissory note, payable to a W. J. Worth, and made by White, the defendant. It was indorsed in blank by Wóρθ and by E. Olcott, and had upon it a special indorsement, in these words: "Pay to E. Olcott, or order. [Signed] E. C. Kendrick, Cashr." It was objected that no formal transfer of the note had been shown from Olcott. But the court said that, in suing the payee under a blank indorsement, this was not necessary. Only in case of suit against Olcott would it have been necessary to prove Kendrick's signature. All the bank must prove was the signature of the payee in blank. Any holder, in the example just given, to sue Richard Roe, must prove the signature of Thomas Robinson, because that is a special indorsement. But in all the other cases, the indorsement in blank would presuppose right and possession, and merely the signature of the indorser or maker sought to be recovered against would have to be proved.

<sup>9</sup> *Watervliet Bank v. White*, 1 Denio, 608.

<sup>10</sup> *Pentz v. Winterbottom*, 5 Denio, 51.



**Indorsement Without Recourse, Conditional and  
Restrictive Indorsement.**

**84. AN INDORSEMENT WITHOUT RECOURSE**

—Or qualified indorsement, means that the indorser exempts himself from liability to indemnify the holder upon the dishonor of the bill or note.

**85. A CONDITIONAL INDORSEMENT—**Means an indorsement by which the title to the instrument does not pass until the condition mentioned in the indorsement is fulfilled.

**86.** The condition or qualification of the indorsement in no way affects the negotiability of the paper.

**87. A** payment of the instrument by the acceptor or maker to the conditional indorsee before fulfillment of the condition is not a discharge of the obligation.

**88. A RESTRICTIVE INDORSEMENT—**Means that the title of the bill or note is vested in the indorsee, as a trustee for the benefit of a third person; or that the indorsee is deputed by the indorser to be his agent in collecting the bill or note.

We have seen that, whether an indorser makes a blank or a special indorsement upon the instrument, he at the same time incurs a liability as an indorser thereon, and also transfers it. This is true of indorsements generally, whatever be their form, provided the intention to be bound and to transfer be present. If these can be construed from its form, it is sufficient to make the writing an indorsement.

For example, the words, "I this day sold and delivered to C. A. the within note,"<sup>11</sup> and also a written agreement to pay a note "as if by me indorsed,"<sup>12</sup> were each deemed indorsements. And any form of words consistent with the tenor of the main instrument, and showing such intention, will be treated by the courts as creating the contract.

The needs of commerce have created special forms of indorsement modifying and limiting the effect of this contract, without, however, destroying the effect of the negotiability of the main instrument. An indorser may exempt himself from liability as an indorser by an indorsement without recourse, and yet the instrument remain negotiable. He may perhaps, by a conditional indorsement, give all subsequent parties notice that, so far as he is concerned, the title to the instrument has not vested in his indorsee and subsequent parties, and that the instrument cannot be safely paid to the holder until some condition written upon it is fulfilled, or he may restrict it in its circulation. The reason of these indorsements is to be kept carefully in mind while examining them. They are based upon the idea that the right of property in the lawful owner implies the right, not merely to sell it outright, but also to make such disposition of it as he sees fit.

The indorsement without recourse is in form of words, "Without recourse," or "Sans recourse," or "At the indorsee's own risk," or "I hereby indorse and transfer my right and interest in this bill to C. D., or order, but with this express condition: that I shall not be liable to him or to any subsequent holder for the acceptance or payment of the bill." It throws no discredit on the bill. Such an indorser does not escape from the effect of the warranties, as explained

<sup>11</sup> Adams v. Blethen, 66 Me. 19.

<sup>12</sup> Pinnes v. Ely, 4 McLean, 173.

later on. The promisee of a negotiable bill or note indorses it to a third person, merely stipulating that, as the indorser, he is not to be responsible if the acceptor or maker does not pay it. This he may do, because he has the property in the bill or note, and he may dispose of it on what terms he pleases. Such an indorsement does not render the negotiable security no longer negotiable. The note remains negotiable in the hands of the indorsee, although he has no remedy against the indorser without recourse. And, into whose hands soever the note may come, the maker is still liable according to the terms of his original contract.<sup>13</sup> The question with the courts in construing indorsements without recourse is whether the words of the indorsement are such that they clearly express an intention on the part of the indorser not to be bound, and a corresponding intention on the parts of the immediate subsequent indorsee, evidenced by their acceptance of the instrument with such an indorsement, to exempt the indorser from his liability.<sup>14</sup> The presumption is rather that the usual liability of an indorser is intended to be incurred; and, to overcome this, it must clearly appear that the transfer of the instrument was only to transfer the title to it, and not to indemnify the indorsee against loss in case it was not paid by the acceptor or maker.

The conditional indorsement is a device by which a payee or an indorsee may part with the possession of an instrument, but not with the legal title to it. Mr. Daniel instances, "Pay to A B, or order, if he arrives at 21 years of age," or "Pay to A B, or order, unless before payment I give you notice to the contrary," as examples of conditional indorsements, the former being an indorsement upon

<sup>13</sup> *Rice v. Stearns*, 3 Mass. 225.

<sup>14</sup> *Fassin v. Hubbard*, 55 N. Y. 465.

a condition precedent, and the latter one upon a condition subsequent. These conditional indorsements have not come very often before the courts, but they are recognized as a distinct class. It is probable that the same rules which govern conditional bills and notes govern conditional indorsements. And probably the courts allow them to be negotiable for the same reasons. Commercial convenience has overridden the strict theory of negotiability. This theory would not permit to exist a condition which charged every subsequent indorsee with the duty of seeing whether the condition had been fulfilled before he could legally own the instrument; for, certainly, with the conditional indorsement, as well as with the conditional bill or note, it would be a most effective restriction to circulation as a medium of payment. With this criticism in mind, it is well to note the authority usually referred to.<sup>15</sup> There this indorsement was made upon an ordinary draft: "Pay the within sum to Messrs. Clark & Ross, or order, upon my name appearing in the 'Gazette' as ensign in any regiment of the line within two months from date." This was transferred to bona fide holders, and the acceptors paid the bill on its maturity to one of these. In the mean time the indorser's name had never appeared in the Gazette as an ensign, and he brought suit as the payee of the bill against the acceptors who had accepted the bill after this condition had been indorsed upon it. And it is to be inferred from the report of the case, that the court decided that such an indorsement was only a conditional transfer of the absolute interest in the bill, and, its condition never having been performed, the transfer was defeated, and the property in the bill vested in the original indorser by reverter. The real point to be emphasized is probably that the condition

<sup>15</sup> Robertson v. Kensington, 4 Taunt. 30.



is mere notice to subsequent parties. In *Sanders v. Bacon*<sup>16</sup> a note in usual form had this indorsement, signed by the makers: "The within obligation is to be delivered to the payees of the note as a consideration for a judgment which was to be assigned to the makers." This indorsement the court properly said was no part of the note, and the effect of it was only to show the consideration, and to operate as a notice to any person who might purchase the note. In *Tappan v. Ely*<sup>17</sup> there was a similar state of facts, and the decision followed the words of *Sanders v. Bacon*. In *Bookstaver v. Jayne*<sup>18</sup> a note was indorsed under extrinsic parol conditions, which the court of appeals allowed to be shown in evidence between the parties. And the effect of these authorities is explained in *Benedict v. Cowden*,<sup>19</sup> and they are compared with the seemingly conflicting authorities: *Hartley v. Wilkinson*,<sup>20</sup> *Cholmeley v. Darley*,<sup>21</sup> and *Leeds v. Lancashire*.<sup>22</sup> It is there shown that such indorsements, where it is the intention of the parties that they are not to affect the original contract, are no part of it. It was not the intention of the original parties that the main instrument should be contingent; hence the act of the conditional indorser cannot operate to change the main instrument. It is no part of it; hence, to give it legal effect, it must be treated as a mere notice upon the happening of whose condition a reverter will ensue.

<sup>16</sup> *Sanders v. Bacon*, 8 Johns. 485.

<sup>17</sup> *Tappan v. Ely*, 15 Wend. 363.

<sup>18</sup> *Bookstaver v. Jayne*, 60 N. Y. 146.

<sup>19</sup> *Benedict v. Cowden*, 49 N. Y. 396.

<sup>20</sup> *Hartley v. Wilkinson*, 4 Maule & S. 25.

<sup>21</sup> *Cholmeley v. Darley*, 14 Mees. & W. 343.

<sup>22</sup> *Leeds v. Lancashire*, 2 Camp. 205.

The last of these peculiar classes of indorsements originating in the needs of commerce is the restrictive indorsement. They are of two kinds: One whereby the holder indorses a bill to one person in trust for another,—e. g. “Pay A, for account of B,” or “Pay A, for the use of B;” the other when the holder deposes to an agent the business of collecting a bill,—“Pay to A for my use.” Of the first class is *Treuttel v. Barandon*.<sup>23</sup> There the indorsement was, in effect, “Pay A, for the account of B.” The business object of this was to allow A to collect the amount called for in the bill. The court said that this gave all the world notice that B, not A, was the owner of the bill. So, also, in *Lloyd v. Sigourney*<sup>24</sup> the indorsement was, “Pay to A, for my use,” and the defendants discounted and paid the bill to the payee mentioned in the indorsement. The court said that the instrument could only be discounted for use of the indorser, and not the use of the indorsee, meaning that, to whomsoever the money might be paid, it would be paid in trust for the indorser, and, into whose hands soever the bill traveled, it carried that trust on the face of it. These indorsements evidence the fact that the person holding the bill is not entitled to the proceeds of it; hence the main import of the original terms of the bill—a promise to pay to the order—is not destroyed. In other words, the bill still continues to be negotiable. The payor pays, not to the payee, but to the payee, on somebody else’s account; and it follows that the instrument may be kept in circulation, and that the restrictive indorser is still liable as indorser.

The other kind of restrictive indorsements is quite different. Such are: “Pay to P. only,” “Pay to my steward, and

<sup>23</sup> *Treuttel v. Barandon*, 8 Taunt. 100.

<sup>24</sup> *Lloyd v. Sigourney*, 5 Bing. 525.

no other person," "Pay to my servant, for my use," "Pay to A, for collection." These, on the other hand, show no intention to pass a title to the bill,—no assent on the part of the indorser to obligate himself to the liabilities of an indorser. They mean that the instrument is only handed over to another person to collect when due. It must be confessed that there is much confusion in this distinction which is attempted to be made. But the question probably turns upon the point in the construction of the indorsement whether the words are such that they negative the presumption of consideration for the indorsement, and are such as indicate that they are not intended to pass the title, but merely to enable the indorsee to collect for the benefit of the indorser. In other words, the question is, does the indorsement create merely an agency, and thus negative the presumption of the transfer of the bill to the indorsee for a valuable consideration. In the first class the construction was that the indorser parted with his whole title to the bill, and the presumption was that he did so for a consideration. The only effect of such an indorsement by way of restriction was to give notice of the rights of the beneficiary named in the indorsement, and to protect him against a misappropriation; that is to say, that in such an indorsement as "Pay A, or order, to the use of B," A could not pass off the bill for his own debt.<sup>25</sup>

### Nature of Indorsement.

89. The nature of an indorsement is as follows.  
It is:

- (a) A contract which the indorser assumes with his indorsee and subsequent holders that, if the drawee or maker fails to honor the

<sup>25</sup> Hook v. Pratt, 78 N. Y. 371.

bill or note, he will, upon the performance of certain conditions imposed by the law merchant, indemnify the holder for all loss incurred by reason of the dishonor of the bill or note.

(b) **A transfer of the title to the instrument.**

**EXCEPTION**—The foregoing contract relation is not assumed, but a transfer of title is effected by the indorsement of the following parties:

- (1) **An infant, (see supra, § 44 (b.))**
- (2) **A corporation acting ultra vires, (see supra, § 44 (d.))**
- (3) **An indorsement by way of gift.**
- (4) **An indorsement without recourse, (see supra, § 84.)**

Perhaps the most important aspect of the indorsement is that it is a distinct contract. The nature of this contract is set forth in the principal text in a statement formulated by Professor Ames, and chosen from among statements of similar tenor common among the text writers. "The indorsement of a bill," it is declared in *Penny v. Innes*,<sup>26</sup> "gives it all the effect of a new instrument as against the indorser, though it does not in fact create a new instrument. Every indorser of a bill is a new drawer, and it is a part of the inherent property of the original instrument that an indorsement operates as against the indorser in the nature of a new drawing of the bill by him. It is sufficient to say at this time that the first legal fact of the theory with which the student should familiarize himself is that, from the form of words which we have al-

<sup>26</sup> *Penny v. Innes*, 1 Crompt. M. & R. 439.



ready given as common methods of indorsement, the courts have created a peculiar class of rights and liabilities, the nature of which will be elaborated in the next chapter. The main terms of the contract are found on the face of the bill or note. In the illustrations under §§ 11, 12, and 14, for example, the main terms were an order or promise to pay at a given time and place a certain sum of money, either to some specified person or to such person as he might direct. The indorser in his contract adopts and ratifies each of these terms, and makes them the main terms of his own contract. This idea will perhaps be made more clear by saying that if, in the illustration under § 14, John Smith had indorsed the note: "Pay to John Jones. [Signed] John Smith,"—John Jones could negotiate it further, despite the indorsement was not in the negotiable form of "Pay to Jones, or order." This is because, by the terms on the face of the instrument, the maker, Thomas Robinson, had promised to pay "to order." This means that he had put into circulation a promise to pay money not only to John Smith, but to any one who might legally hold the instrument. And, except in case of John Smith's making a restrictive indorsement to an agent without intention on his part to transfer title, the indorsement of John Smith would be construed only as an adoption of the promise of Thomas Robinson, which was that the note might pass from hand to hand *ad infinitum*, until Robinson paid it.<sup>27</sup> We may add that, to these stipulations stated on the face of the instrument, the law merchant adds others, such as presentment and protest, which the courts always take into consideration in construing the indorser's contract. This last point, and also the point that an indorsement acts as

<sup>27</sup> *Leavitt v. Putnam*, 3 N. Y. (3 Comst.) 494.

a transfer of title of the instrument, are examined in detail under the later chapters entitled "Presentment and Notice of Dishonor," and under the chapter entitled "Transfer." Here it is our only purpose to fix in mind the elements which, in addition to the forms already given, are fundamental or necessary constituents of an indorsement, and also a few isolated common rules, which form a part of the theory.

### Requisites of Indorsement.

**90.** The requisites of an indorsement are as follows:

(a) It must follow the tenor of the bill or note.

(b) It must be by the payee or a subsequent holder.

**91.** A partial indorsement, so as to split the right of action on a note or bill, or to change its time of payment, is not allowed by the law merchant.

The tenor of a bill or note has already been explained, and for the same reasons the indorsement, as well as the acceptance, must follow the tenor of the original instrument. An indorser may not alter the amount of money obligated in the instrument to be paid, nor the time nor place nor manner of payment. If, for instance, the indorser promised to pay part of the sum called for in the original instrument to one person, and part to another, it would amount to an apportionment of the contract, and the acceptor or maker would thus, by the indorser's act, be liable to two actions where, by the terms of the original contract, he was liable to but one. Thus, were the rule

otherwise, the indorser would be empowered to make a contract for the maker or acceptor without his assent,—a *reductio ad absurdum* in the theory of contracts. This application of the rule, however, does not mean, that when an instrument has been paid in part, a receipt for the amount paid may not be written on its back, and the indorser may not transfer the balance; nor does it mean that a note may not be transferred to two or more persons, who hold it in co-ownership as a joint right; nor does it mean that an instrument may not be indorsed to a third person as collateral security for a claim equaling but part of the amount called for in the instrument itself. All these are perfectly proper courses, because they transfer but one right of action. The test is, does the transfer cut up the right of action, or vary it, or invest different persons with different rights of action against different parties to the instrument. If it does, the instrument is void.

It is sometimes argued that a writing on the back of the instrument, in the form of words of a guaranty or of an assignment, correspond to and follow the tenor and purpose of the instrument; and it is argued that, for this reason principally, they are forms of indorsement. But the better opinion is that they are of the legal effect of what they purport to be,—mere special forms of contract. A guaranty in general terms, such as “I warrant the collection of the within note, for value received,” does not authorize a suit against guarantor by a subsequent holder of the note. This is not an indorsement. It is not even transferable with the instrument itself. It is a special contract, which can be enforced only in the name of and by the person with whom the contract was made.<sup>28</sup> Where the guaranty is

<sup>28</sup> *Lamourieux v. Hewit*, 5 Wend. 307.

in form, "I sell, assign, and guaranty the payment of the within note to John Allen, or bearer," and the instrument upon which this guaranty is written is itself negotiable, then, so far as the guarantor is concerned, the words are still construed as a guaranty not within the privileges of negotiability. In such case the debtor must seek the creditor. He is not entitled to days of grace, but must pay his debt when it is due. As regards the maker of the note, and to render him liable, no demand is necessary, and the guarantor is entitled to no notice of the failure of the maker or acceptor to pay the instrument. But, although such a guarantor lacks these privileges, his guaranty still passes with the instrument, and vests whomsoever may hold the note with right to sue upon it.<sup>29</sup> It amounts, in fact, to an indorsement with a waiver of these privileges we have specified; yet the student must be careful in these respects to remember that it is not an indorsement. Though this proposition is subject to much confusion, arising from the position taken by the courts of some jurisdictions that written words in form of a guaranty may be treated as an indorsement, if it can be shown by extrinsic evidence that such was the intention of the parties, it is a doctrine wiser and more consistent with the theory of negotiability, and more for the benefit of subsequent indorsers, that a written contract of one kind should not be turned into a contract of a different kind by parol proof concerning the intention of the parties; and the indorser of an instrument should not, under certain circumstances, be charged sometimes as a maker or sometimes as a guarantor; and the guarantor of an instrument should not be charged sometimes as a maker and sometimes as a guarantor. Such principles are sub-

<sup>29</sup> *Allen v. Rightmere*, 20 Johns. 364; *Ketchell v. Burns*, 24 Wend. 456; *Prosser v. Luqueer*, 4 Hill, 420; *Hough v. Gray*, 19 Wend. 202.



versive of the certainty necessary for circulating mediums.<sup>30</sup> For a similar reason, it is the better doctrine that words of assignment evidence merely an intent to assign, though there is authority to the contrary. An assignment is not a negotiation of the paper. The beneficial interest merely is transferred, as in the case of any other chose in action. The assignee takes subject to all equities between the original parties existing at the time of the assignment.<sup>31</sup>

### Anomalous Indorsements.

92. A person whose name is on the back of a bill or note, transferrable by delivery, or payable to bearer, is to be deemed an indorser.

93. A person signing on the back of a bill or note payable to order before the payee is *prima facie* presumed to be a second indorser, and not liable to the payee; but this may be rebutted by showing that his indorsement was given to give the maker credit with the payee, and he thus becomes liable as first indorser, the payee being permitted to indorse to him without recourse.

The two rules in the principal text instance the commonest forms where an indorsement is irregular. The first raises the question, what is the legal effect of an indorsement upon an instrument payable to bearer by a person whose name does not otherwise appear as a party to the contract? The second, what is the legal effect of an indorsement upon an instrument made payable to a specific payee, but indorsed before the payee has indorsed and trans-

<sup>30</sup> *Spies v. Gilmore*, 1 N. Y. (1 Comst.) 321.

<sup>31</sup> *Hedges v. Sealy*, 9 Barb. 214.

ferred the instrument? In this last question the explanation is complicated by the fact that, in strict legal theory, the indorsee would have no place either in the transfer of the instrument or incur liability. The payee would transfer and incur liability to his immediate indorsee, and the irregular indorser would thus be eliminated from the instrument entirely.

In both of these cases the underlying principal is the same,—to effectuate the intent of the parties, and to treat each case as an indorsement. If such an indorser put his name on the back of an instrument at the time it was made, according to a promise to become responsible for it, or if he participated in the consideration for which the paper was given, he was as much liable as if he were in fact a joint maker; or if his indorsement was subsequent to the making of the note, and he had nothing to do with the original consideration but put his name on the note to add to the security, he was as much liable as if in fact he had been a guarantor or joint maker. In case of instruments payable to bearer, or to a particular person or bearer, or to a particular person or order, and indorsed in blank, all of which pass by delivery, he was deemed responsible as an indorser, because the inducement and intent of such a writing could evidence nothing else in mercantile law than to make himself liable in the failure of the principal after the holder had exercised due diligence in attempting the collection; and as far as the payee is concerned, if he indorse and deliver over a note or bill, he is entitled to all the privileges of a first indorser, as between himself and the indorsee.<sup>32</sup>

In New York, in case of instruments made payable to the order of a specific person, a curious device has been

<sup>32</sup> Dean v. Hall, 17 Wend. 214, and cases cited.

adopted for carrying into effect the intention of the parties. The problem was to overcome the legal presumption from the face of the note that such an indorser stood in the position of a subsequent indorser to the payee. So far as the paper showed the record of the transaction, such an indorser could only be presumed to have intended to become liable as second indorser, and could only be regarded as a second indorser, and of course not liable upon the note to the payee, who was supposed to be the first indorser. The court, construing the instrument before it, was bound to consider the order of its transfer; as, first, from the maker or drawer to the payee; second, an indorsement by the payee to the irregular indorser as his indorsee; and lastly, by the irregular indorser to the subsequent indorsee on the paper. Thus, the payee could not hold such an indorser liable because he was, so far as the paper showed, his indorsee.<sup>33</sup> But the courts soon saw that carrying this doctrine to all lengths would often mean the enforcement of theory at the expense of justice, and of defeating the intent of the parties. The purpose of the irregular or anomalous indorser in making the indorsement, and of the payee in receiving the instrument with such an indorsement, was, on the one hand or on the other, to enter into a contract of indemnity. The payee took the instrument for value because the indorser's name was there. Hence in such cases the rule was relaxed. The paper itself was held to furnish only *prima facie* evidence of this intention. It was competent to rebut this presumption by parol proof that the indorsement was made to give the maker credit with the payee. To meet the objection that the payee, in order

<sup>33</sup> *Herrick v. Carman*, 12 Johns. 159; *Tillman v. Wheeler*, 17 Johns. 325; *Bacon v. Burnham*, 37 N. Y. 614; *Phelps v. Vischer*, 50 N. Y. 69.



to complete the chain of transfer, must needs be the first indorser, the payee, as holder, was permitted to indorse the instrument to the surety without recourse, and to fill up the blank indorsement of the surety to himself. In this way the parties were placed in the same position as if the maker had in the first instance delivered the note to the payee, the payee had then indorsed it without recourse to the surety, and the surety had then indorsed it to the payee. This, moreover, could be done at any time,—on the trial, or even, if omitted then, on an appeal. The practical effect of this course was to obviate the difficulty raised by the other rule we have just mentioned,—that, where an instrument came into the hands of a person who already appeared upon it as a payee, he could not maintain an action against any of the parties whose indorsements were subsequent to the first appearance of his name, because each of these persons, on paying him the note, would have an immediate right to demand payment from him on his earlier indorsement. The law in such case, to avoid this circuitry, denied him the right of action. But, by the intervention of this device, this defense of circuitry was not available against him, because the irregular or anomalous indorser, under his agreement of indemnity with the payee, could have no right of action against the payee, and, the reason failing, the rule itself fell to the ground.<sup>34</sup> It is important to notice that it is incumbent on the payee suing the indorser to show that such indorsement was made by the indorser to give credit to the note, and was taken by him because of such credit. He cannot be silent upon this point, and avail himself of the rule, for the presumption is that such an indorser is a second

<sup>34</sup> Hall v. Newcomb, 3 Hill, 233, s. c. in error 7 Hill, 416; Moore v. Cross, 19 N. Y. 227; Coulter v. Richmond, 59 N. Y. 478; Jaffray v. Brown, 74 N. Y. 393.



indorser, and not liable to the payee. The burden is upon the payee to show that, by agreement between the parties, the liability is otherwise.

In many jurisdictions, however, the courts did not see their way to give this blank signature the effect of a regular indorsement. Some of the courts have held the anomalous indorser liable as a guarantor. With others this was held in contravention of the statute of frauds, and the anomalous indorser's liability was treated as that of a joint maker. In England he is under no liability at all. The scope of this work does not admit of more than this enumeration of the various other positions taken by the courts upon this vexed question. If the student desires to inquire further, a very good classification of collated cases and arrangement is to be found in Professor Ames' *Bills and Notes*,<sup>35</sup> and also in the note of Judge Hand to *Cromwell v. Hewitt*.<sup>36</sup> The foregoing is submitted as the theory most consistent with the general doctrine of the negotiable instrument.

### PROBLEMS.

(1) B makes a note in the form "Pay C," omitting to add the words "or order." Is this note negotiable?

(2) Is an express promise in writing to indorse a bill an indorsement?

(3) C, the payee of a bill, indorses it in blank, and transfers it to D. D specially indorses it to E, or order. E, without indorsing it, transfers it to F. What parties may F sue?

(4) A bill is drawn payable to C, or order. C indorses it to D, thus, "Pay the contents to D," omitting to add the words "or order." Is this bill negotiable?

<sup>35</sup> 1 Ames, *Bills & N.* p. 269.

<sup>36</sup> *Cromwell v. Hewitt*, 40 N. Y. (1 Hand,) 493.

(5) C, the holder of a bill for \$100, indorses it, "Pay \$50 to D, or order, and \$50 to E, or order." Is this valid?

(6) C indorses a bill, "Pay D, or order, for my use." D indorses it to, and discounts it with, E, on his own account. E collects it at maturity. Can C recover the amount of the bill from E?

(7) C, the holder of a note, signs it, and writes thereon, "I bequeath the within to D, or his order, at my death," and gives it to D. Is this an indorsement?

(8) Does an indorsement, "Pay D, or order, for the use of X," pass full title to the instrument on indorsement by D?

(9) C, the holder of a bill for \$100, indorses it, "Pay D, or order, \$30." Is this invalid?

(10) C, the holder of a note, signs it, and writes thereon, "I hereby guaranty the payment of this note," and delivers it to D. Is C entitled to notice of protest?

(11) A draws a bill on B, and indorses it to C. C indorses it, "Pay D, or order, for my use." The bill is dishonored, and D sues A, the drawer. A defends that D is not the owner of the bill. Is this available?

(12) C, the holder of a note, signs it, and writes thereon, "I hereby assign all my right and title to the within note to D." Is this an indorsement? Is C liable as indorser?

(13) D is the holder of a bill indorsed in blank by C. D writes over C's signature, "Pay to E, or order," and hands the bill to E. Does this operate as a special indorsement from C to E?

(14) C, the holder of a bill, indorses it to D, thus: "Pay D, or order, without recourse to me." Can C be sued by D as an indorser? Explain the theory of an indorsement without recourse.

(15) C, the payee of a bill, indorses it in blank, and transfers it to D. D specially indorses it to E, or order. E, without indorsing it, transfers it to F. Can F sue D or E?

(16) Explain the difference between the following words appearing as indorsements: "Pay D & Co., or order, for collection." "Pay D, or order, for my use." "Pray pay the money to my use." "The within must be credited to D, value in account."

(17) C, the holder of a bill, indorses it, "Pay D, or order, upon my name appearing in the Gazette as ensign in any regiment, between the 1st and 64th, if within two months from this date." The bill is subsequently accepted. D indorses it to E, who indorses it to F. At maturity, F presents the bill to the acceptor, who pays it, although the condition has not been fulfilled. Can C sue the acceptor and recover?

## CHAPTER V.

### OF THE NATURE OF THE LIABILITIES OF THE PARTIES.

- 94-96. Acceptor and Maker.
  - 97. Facts Which Acceptor is Estopped to Deny.
  - 98. Facts Which Acceptor Does not Admit.
  - 99. Damages for Which Acceptor is Liable.
  - 100. Damages for Breach of Promise to Accept.
- 101-104. Acceptor Supra Protést.
- 105-108. Drawer and Indorser.
  - 109. Facts Which Drawer is Estopped to Deny.
  - 110. Facts Which Indorser is Estopped to Deny.
  - 111. Indorser without Recourse.
- 112-114. Breach of Warranties and Damages Therefor.
- 115-117. Accommodation Parties and Persons Accommodated.

### Acceptor and Maker.

94. The obligation of an acceptor on a bill, and of a maker on a note, is identical. Upon acceptance of a bill, the drawer stands in the relation of indorser.

95. The drawee of an unaccepted bill is not a debtor upon nor bound to pay it. There is no privity of contract between him and the holder.

96. The acceptor and maker each promise the payee and subsequent holders that they will pay the bill or note according to its tenor at the time of signing.

Under § 55, we commented upon the shifting relations of the drawer, the holder, and the drawee or acceptor of a bill before and after acceptance. It is our purpose in a later



section to show that the phrase, "The acceptor of a bill and the maker of a note is the principal debtor thereon," in its practical aspect, means that against them there is no necessity for presentment at a particular place, or of protest, or of notice of dishonor; and also that all parties look to them to eventually pay the instrument. As has been shown, the bill and its acceptance is a direct transfer to the holder of so much money of the drawer in the acceptor's hands. In technical phrase, there is a direct privity of contract between the holder and acceptor. An acceptance was, at common law, evidence of money had and received by the acceptor to the use of the holder.<sup>1</sup>

The drawer is presumed to draw upon funds in the hands of the drawee; the payee is presumed to have given a full value for the bill; and, when the drawee accepts the bill, he becomes an immediate debtor to the payee, as upon a valuable consideration paid to the drawer upon the funds in the hands of the acceptor. It is true that the payee has his remedy against the drawer in case the bill be not paid pursuant to the engagement of the acceptor. The remedy is, however, concurrent against the drawer and acceptor; and in this respect the acceptor stands in the same relation to the payee as the maker of a note does to the indorsee; and the drawer is regarded in the light of an indorser of a note.

By the act of acceptance the acceptor becomes a principal, and not a collateral, debtor.<sup>2</sup>

With reiteration of principles we have noticed before and shall speak of again, we desire to pass to some of the peculiar conditions which the law merchant attaches to the contract of acceptance.

<sup>1</sup> Black v. Caffé, 7 N. Y. 281.

<sup>2</sup> Wolcott v. Van Santvoord, 17 Johns. 248.

### Facts Which Acceptor is Estopped to Deny.

97. The acceptor of a bill of exchange, by the acceptance, is estopped from denying to a bona fide holder:

- (a) The genuineness of the drawer's signature.
- (b) The existence of the drawer.
- (c) The capacity of the drawer to make the draft.
- (d) His authority to draw for the sum named;  
i. e. that the acceptor has funds of the drawer in his hands.
- (e) Where the bill is to the payee's order, that the payee was competent to make the indorsement.

What are called the "warranties" of the acceptor are a phase of the legal doctrine of estoppel. "An estoppel," says Lord Coke, "is when a man is concluded by his own act or acceptance to say the truth." And with bills the acceptor is precluded from testifying in the instances given in the principal text. It may well be in case of an acceptor that his drawee had no existence, or that his signature is forged, or that the acceptor had no funds of the drawee in his hands when he accepted the bill. But the legal estoppel shuts out all evidence of these, and thus they cannot be availed of as defenses. From this rule of evidence it is but an easy step to develop a right of contract. The holder of the bill may, perhaps, by the operation of this very rule, and by its operation alone, be enabled to recover the amount of the bill from the acceptor. This being established as a rule of business, it grows to be something more than a mere rule of evidence. With indorsements it becomes a dis-

tinct right on which persons act when they discount the instrument. With them it is not inaccurate to speak of these estoppels as warranties, or distinct stipulations created by law and embodied in the indorsement.

As between the payee or some subsequent holder, who has taken the bill in good faith, and the acceptor, whose acceptance has given currency to the bill, the latter must bear the loss, if any arises. He may not give in evidence any of the defenses specified in the principal text. This rule is based on sound business reasons. The acceptor's promise is a distinct and separate one to all parties who, upon the faith of it, have given value. It is more just to hold the acceptor to knowing his own correspondent with whom he has business dealings than to subject every holder who may take a bill in its circulation to loss or danger of loss from parties of whom he knows nothing. When the acceptor and the holder are each innocent, the acceptor, who had the best means of knowledge, is the more negligent of the two; and therefore the equities are against him.

*Price v. Neal*<sup>3</sup> is usually quoted as the leading case in illustration of this. This was an action on the case by Price to recover from Neal the sum paid him on two bills of exchange, of which Price was the drawee. One of the bills had been paid by Price without a previous acceptance; and the other was first accepted, and, after acceptance, indorsed for value to the defendant, and then paid at maturity. There had been a forgery of the drawer's signature in the case of both bills. Lord Mansfield said: "It was incumbent upon the plaintiff to be satisfied that the bill drawn upon him was the drawer's hand before he accepted it or paid it; but it was not incumbent on the defendant to inquire into it." This means that it is a just and reason-

<sup>3</sup> *Price v. Neal*, 3 Burrows, 1354.

able rule in the conduct of business to require the acceptor, when the bill is presented for acceptance or payment, to examine the signature of the drawer. He, better than the payee or any innocent third party, can be supposed to know the signature and handwriting of the drawer,—as we have said, usually his customer or correspondent. He, rather than such party, should be held to detect the forgery, or to know the fact that the drawer had no funds in his hands, or that he had no legal right to enter into a binding contract; and if he fails in such examination, and acknowledges by his acceptance the genuineness of the right to make the order upon him contained in the bill, it is his neglect, and must be his loss, rather than that of any one who has taken the bill in good faith and for value.<sup>4</sup>

These fundamental reasons, which we have given in the particular instance of forgery of the drawer's signature, have governed the courts in the other cases we have classified. Where there is no such person in fact as the drawer, then it has been decided<sup>5</sup> that the fair construction of the acceptor's undertaking is that he will pay to the order of the same person that signed for the drawer. He ought not to have accepted the bill without knowing whether or not there were such persons as the supposed drawers. If he chooses to accept without making the inquiry, then he must be considered as undertaking to pay to the signature of the person who actually drew the bill.

<sup>4</sup> *Archer v. Bank of England*, 2 Doug. 639; *Smith v. Mercer*, 6 Taunt. 76; *Wilkinson v. Johnson*, 3 Barn. & C. 428; *Cocks v. Masterman*, 9 Barn. & C. 902; *Cooper v. Meyer*, 10 Barn. & C. 468; *Sanderson v. Collman*, 4 Man. & G. 209; *Smith v. Chester*, 1 Term R. 655; *Bass v. Clive*, 4 Maule & S. 15; *Bank of Commerce v. Union Bank*, 3 N. Y. (3 Comst.) 230; *Goddard v. Merchants' Bank*, 4 N. Y. (4 Comst.) 149; *Canal Bank v. Bank of Albany*, 1 Hill, 287.

<sup>5</sup> *Cooper v. Meyer*, 10 Barn. & C. 468.



Closely connected with this is the kindred doctrine that the acceptor may not set up as a defense that the drawer had no capacity to make the draft. He may not, for instance, say that the drawer is an infant or a lunatic or a married woman, or that, as a corporation, the act of drawing is ultra vires, or that the drawer is a bankrupt; and for this reason he can recover nothing over against him because the drawer is incapacitated to make a contract, or because he has none of his funds in his hands, for the acceptor of a bill in theory is presumed to accept upon the funds of the drawer in his hands. In ordinary business affairs, whenever the drawer is liable to the holder, the very theory of a draft implies that the acceptor is entitled to a credit as between him and the drawer on their mutual current accounts if he pays the money called for in the bill or accepts it. And so, if he accepts without funds in his hands, and upon the credit of the drawer, he must look to the drawer for his indemnity. These mutual relations between the drawer and acceptor are no answer to the claims of the holder, because, if the acceptor were permitted to say, "The drawer is an infant or a lunatic, and I will not pay you upon this bill because the drawer will not pay me or credit me upon our mutual account," it would be a very serious objection to accepted bills being negotiated. So, also, it is no defense that the acceptor accepted the bill for the accommodation of the drawer, or even that the payee or holder took it knowing it to be an accommodation acceptance.<sup>6</sup> The reason which has influenced the courts is well stated by Judge Lawrence in *Charles v. Marsden*.<sup>7</sup> "It is to be supposed," says Judge Lawrence, "that the drawer

<sup>6</sup> *Grant v. Ellicott*, 7 Wend. 227; *Harger v. Worrall*, 69 N. Y. 370; *Heuertematte v. Morris*, 4 N. E. Rep. 1, s. c. 101 N. Y. 63.

<sup>7</sup> *Charles v. Marsden*, 1 Taunt. 224.

persuades a friend to accept a bill from him because he cannot lend him money. Now, would there be any objection if, with the knowledge of the circumstance that this is an accommodation bill, some person should advance money upon it before it was due." The indorser has discounted the bill on the faith of the acceptor's promise, and it is no answer for the acceptor to say to him, "I have received nothing for this acceptance."

We cannot do better than follow Senator Daniel in his succinct statement of reasons for the rule that the acceptor warrants, when the bill was indorsed before acceptance, that the payee was competent to indorse. To insure negotiable securities a ready circulation, a person may not dispute the power of another to indorse an instrument, when he asserts by the instrument which he issues to the world that the other has such power. The drawer of the bill, on his putting it into circulation, holds out to all the world that there is such a payee as is described in the instrument, and that, having made the instrument payable to such payee's order, the payee on his part may order the instrument paid to some one else in turn. When the drawee accepts the bill, he assents to these two propositions, and he assents to the proposition, especially, that the payee is competent to indorse. Hence the acceptor may not say that the payee was an infant, or an insane person, or a bankrupt, or a corporation without legal existence. "Indeed," says Senator Daniel, "there could be no reason why the acceptor should be interested to show that the payee was incompetent to make the order, for he has been guaranteed in that regard by the drawer, and may charge the amount in account against him, whether the payee were competent or not."<sup>8</sup>

<sup>8</sup> Daniels, Neg. Inst. § 536.

**Facts Which Acceptor Does not Admit.****98. An acceptance does not admit:**

- (a) That the payee's indorsement is genuine.
- (b) That all the terms contained in the bill at the time of acceptance are genuine.

The rules relating to estoppel, as we have seen, are based upon the supposed negligence of the drawee in failing, by an examination of the signature when the bill is presented, to detect the forgery of the drawer's name, and to refuse payment; and that because the drawee should be supposed to know the handwriting of the drawer, who is usually his customer or correspondent; that, between him and an innocent holder, the payer from his imputed negligence should bear the loss. But here the courts stop. It is only the facts pertaining to the drawer, such as his existence, capacity, and authority, that the drawee can be reasonably presumed to be familiar with. But of the payee's indorsement he can know nothing. There is also no ground for presuming that the body of the bill is in the drawer's handwriting, or in any handwriting known to the acceptor. If the forgery committed is that of the payee's name, or consists in altering the date or amount of the bill, there is no reason why the acceptor should be presumed to know the handwriting of the indorser or of the body of the bill, or that he should be better able than the indorsers to detect an alteration in it. The forgery being in the body of the bill, or in the payee's signature, the greater negligence here is chargeable upon the party who received the bill from the perpetrator of the forgery.<sup>9</sup> The result of the foregoing

<sup>9</sup> Bank of Commerce v. Union Bank, 3 N. Y. 230.

rule is that, if the signature of the payee or of the indorser be forged, the acceptor will not be bound to pay the bill to any one who traces title through such indorsements; and, if he has gone so far as to pay the bill to any one holding it under such forged indorsement, he may, as a general rule, recover back the amount. So, also, if the bill has been altered so as to purport to bind the drawer for a larger sum or in a different manner than in the original bill, he will not be bound to pay the bill; and, if the bill is paid, he may in the same way recover back the money paid upon it.<sup>10</sup>

### Damages for Which Acceptor is Liable.

99. The acceptor of a bill of exchange, upon its dishonor, is liable in damages as follows:

- (a) For the amount of the bill.
- (b) Legal interest.
- (c) Notarial expenses and loss on re-exchange.

### Damages for Breach of Promise to Accept.

100. Where the drawee of a bill for a valuable consideration has agreed to accept the same, and, by dishonoring the draft, breaks his contract, he is liable in damages for the immediate consequences resulting from the breach. It is to be noted that his liability is for the breach of promise to accept.

<sup>10</sup> Holt v. Ross, 54 N. Y. 479; White v. Continental Bank, 64 N. Y. 316.



### Acceptor Supra Protest.

101. The undertaking of the acceptor supra protest is analogous to that of the indorser.

102. METHOD—To consummate the liability of the acceptor supra protest, it is necessary to take three steps:

- (a) To present the bill at maturity to the original drawee.
- (b) Upon refusal of the original drawee to pay, to protest for nonpayment.
- (c) To present the bill for payment to the acceptor supra protest, and, on his refusal, protest it, stating the foregoing steps, notice of which must be sent to the drawee and indorsers.

103. It is probable that the acceptor supra protest is estopped from denying and warrants to a bona fide holder the same facts of estoppel and warranty as an ordinary acceptor.

104. The acceptor supra protest may recover from the party for whose honor he has accepted, and all parties whom the latter would have recourse against, the damages paid by him by reason of this acceptance.

The foregoing doctrines are common among the text writers, and are probably the positions which would be taken on the subject by the courts. The cases, however, involving questions of such acceptances, are not many, and the rules relating to them, therefore, not established. The

meaning and process of an acceptance *supra* protest have already been explained. As a contract, it is an undertaking to pay if the original drawee, upon a presentment to him, should persist in dishonoring the bill, and such dishonor by him be notified by protest to the person who has accepted for honor.<sup>11</sup> It is thus not like the contract of the acceptor,—an absolute engagement to pay at all events,—but only a collateral conditional engagement to pay if the drawee does not. Hence the reason of the giving of the acceptance requires a second resort to the drawee when the bill is in the hands of the holder under an acceptance *supra* protest, and a further protest for nonpayment by such drawee. It might be that effects would reach the drawee, who had refused in the first instance, out of which the bill may and would be satisfied, if again presented to the drawee when the period of payment arrived. "This appears to me," said Chief Justice Tenterden,<sup>12</sup> "to be a very sensible interpretation of the nature of acceptances for honor where the parties say nothing of the subject. It is equivalent to saying to the holder of the bill: 'Keep the bill. Don't return it, and when the time arrives at which it ought to be paid, if it be not paid by the party on whom it was originally drawn, come to me, and you shall have the money.'" The courts thus clothe with language and interpret the intention of the acceptor *supra* protest in giving an acceptance and of the holder in receiving it. To effectuate this intention, the first step is to present the bill at maturity to the original drawee, and to require him to pay it, and to protest it if he does not.

Upon the refusal of the original drawee to pay the bill and its protest, it may or may not be paid by the acceptor

<sup>11</sup> *Hoare v. Cazenove*, 16 East, 391.

<sup>12</sup> *Williams v. Germaine*, 7 Barn. & C. 463.

for honor. If it is paid by him, such payment may be made for the honor of the drawee or acceptor, or he may pay it for the honor of all the parties,—for honor generally, as such payment is termed. A payment of this kind does not, like a single payment by the original drawee, operate as a satisfaction of the bill, but itself transfers the holder's rights to the party paying.<sup>13</sup> For example, if the payment is made for the honor of a particular indorser, the party paying may sue such indorser and all parties prior to him to whom he could have resorted.<sup>14</sup> If he pays for the honor of the bill generally, it is the same as payment for honor of the last indorser, and he may recover against all parties to the bill.<sup>15</sup> If the bill is not paid by the acceptor supra protest, then the rule laid down by Lord Tenterden<sup>16</sup> is generally applied, and the reasons for it accepted as the true ones. "Whatever is requisite to enable a person who has accepted a bill for honor of another to call upon that person to repay him, and to enable him to recover over against such person, may also be reasonably held necessary to enable another party to recover against such an acceptor for honor; for, if you could recover against an acceptor for honor by proof of less than will enable him to recover against the party for whom he accepts, there would be an inconsistency, for it might be said with some reason that, if the acceptor for honor chose to pay without requiring all the proof from the holder which would be necessary for him to recover against the drawer, the payment would be made in his own wrong, and he would not be entitled to recover over. It seems, therefore, that the same rule as to proof which pre-

<sup>13</sup> *Smith v. Sawyer*, 55 Me. 141; *Vandewall v. Tyrrell*, 1 Moody & M. 87.

<sup>14</sup> *Mertens v. Winnington*, 1 Esp. 112.

<sup>15</sup> *Fairley v. Roch*, Lutw. 891; *Ex parte Lambert*, 13 Ves. 179.

<sup>16</sup> *Williams v. Germaine*, 7 Barn. & C. 468.

vails in the case of an acceptor for honor in suing the party for whose honor he accepts, must also be observed when the holder of a bill sues the person so accepting.”<sup>17</sup>

In other respects the liability of the acceptor for honor is probably that of an ordinary acceptor.<sup>18</sup> He would be bound by any estoppel binding on the party for whose honor he accepts. He accepts the bill in the usual course of business. He assumes by his act the liability of an acceptor, and he would probably be held to the strict performance of his engagement as it is interpreted by the courts in the case of an acceptor.

### Drawer and Indorser.

105. The indorsement of a bill or note is a fresh contract embodying in itself all the terms of the instrument indorsed, and, in case of a bill, is equivalent to the drawing of a new bill on the drawee by the indorser.

106. Every drawer promises the payee and subsequent holders, and every indorser promises his indorsee and subsequent holders, that if the bill or note is presented for payment to the drawee or maker, and payment demanded and refused, and the bill or note is protested, and due notice of these facts is sent to him, he will indemnify the holder for all loss incurred.

107. The drawer of a bill of exchange promises the payee and subsequent holders that if on due pre-

<sup>17</sup> *Konig v. Bayard*, 1 Pet. 250; *Schofield v. Bayard*, 3 Wend. 488.

<sup>18</sup> *Goddard v. Merchants' Bank*, 4 N. Y. 147.



sentment it be not accepted, and due notice of dishonor be given, he will indemnify them for all loss incurred.

108. The liability of the indorser is several from that of all the other parties to the instrument.

Under the subject of "Indorsements," we have already introduced the student to the idea that an indorsement is in law a separate contract, having in general for its principal terms the words which appear on the face of the paper. The indorsement, as we have shown, in some sort ratifies or guaranties these terms. In then discussing the subject, we tried only to make clear some of the legal meanings the courts have given to various of the commoner forms of words in which indorsements usually appear in business. It is now our purpose to show briefly the more common legal liabilities which the courts have embodied in the contracts of the drawer and indorser.

Among the first consequences which follow from this doctrine is the rule that, when an instrument is made in one jurisdiction and the indorsement in another, the parties to the same instrument may be controlled by very different rules of law. In *Aymar v. Sheldon*<sup>19</sup> the action was by an indorsee against an indorser of a bill of exchange, drawn in France, and indorsed and negotiated to the plaintiff in New York city. The question was whether the French law or the law of New York should prevail in regard to the indorsement. Judge Nelson said that the contract of the indorser was a new and independent contract, and that the extent of his obligations was determined by that particular contract; that the transfer by indorsement was equivalent, in effect, to the drawing of a new bill, the indorser being in

<sup>19</sup> *Aymar v. Sheldon*, 12 Wend. 439.

almost every respect considered a new drawer. The judge pointed out that the contract of indorsement was made in New York, and the parties must be presumed to have had in contemplation the laws of New York at the time they made the contract; and hence the law of New York, and not that of France, must settle the liability of the parties, and this even though, because of the conflict of local laws, it would defeat a remedy against the party who must be proceeded against in a foreign jurisdiction. It naturally follows, too, that, so long as the promise of the drawer and indorser is a separate and independent one, it must always be several in the liability incurred under it. The indorsee enters into a contract with his immediate party from whom he got the bill and who indorsed it to him. Every prior indorser on the bill, by virtue of his indorsement, makes a promise to each new indorsee. If A, B, C, and D are indorsers on a negotiable instrument, A makes separate promises to do certain things with C, D, and E; the same with C and D. They each make promises with every individual who comes after them on the instrument. The liability of each indorser is in legal phrase several from that of all other parties to the instrument; and the very first interpretation by the courts of the engagement of the indorsers is the indemnity or guaranty we have spoken of, namely, that if the prior parties do not pay the instrument according to its tenor, upon due presentment and notice to him, the indorser will. Presentment to the drawee, acceptor, or maker, either for acceptance or payment, is necessary. That is the condition precedent implied by the law merchant, and further forms must be followed, such as demand, refusal, notice of dishonor, all of which subjects have certain set rules, which are taken up and discussed hereafter. It is necessary, first, to fix the dishonor of the bill by presentment, demand, and protest, and then, this

being established, to proceed according to certain regulations followed by merchants according to certain well-established rules. So, also, to hold indorsers before presentment to the drawee for acceptance, it is necessary, first, to present the bill for acceptance, and, if accepted, afterwards to present it for payment before the right of action accrues; for this right of action does not accrue until the non-performance of the condition precedent of presentment, notice, and demand.

### Facts Which Drawer is Estopped to Deny.

109. The drawer of a bill before acceptance is estopped from denying and warrants to the bona fide holder:

- (a) That there is a drawee, and that he is capable of accepting.
- (b) That he will accept.

When the drawer issues a bill to the world, he undertakes two things: One is that the situation, nature, or character of the drawee is such that the bill can be accepted; and the other is that the drawee, upon presentment, will accept the bill. The drawer, in indicating the place of presentment to the drawee of the bill, as "To John Smith, at Baring Bros.," contracts that the drawee may be found at that place, and the bill presented to him there. A leading case on this point, followed by other authorities, is *Mellish v. Simeon*.<sup>20</sup> There the bills were drawn in Paris in 1794, and the French directory forbade their acceptance. The court applied the rule that the loss should

<sup>20</sup> *Mellish v. Simeon*, 2 H. Bl. 378.

not fall upon the payee or indorsee before acceptance, but upon the drawer who issued the bill, and that the drawer should be deemed to warrant this in all cases: that the situation of affairs would be such that the bill could not be presented for acceptance; and that the payee was a person who could make a valid contract. If this turned out not to be the case, then the drawer must bear the loss. He must furthermore bear all loss incurred, such as re-exchange, notarial expenses, and other damage necessarily incidental to the failure to obtain the acceptance, because the party taking the bill was obliged to take these steps to collect the bill, and if the drawer's contract was broken, and such collection failed, the drawer must reimburse such party. The holder of a bill, when it reaches, in the course of its circulation, the acceptor, may present the bill to the acceptor, and if the acceptor refuses to accept, although the bill is not due, the holder may at once turn upon the bill, and hold the drawer, indorsers, and all prior parties. The reason of this is to guaranty the circulation of bills by preventing the drawer from withdrawing funds from the hands of the drawee before the bill falls due, and also to assure him that in case anything is wrong between the drawer and acceptor, and the acceptor refuses to accept, so that he may hold him as a principal debtor, he may at once turn to the parties through whom the bill is circulated, and who treated it as the equivalent of cash and paid money, each in turn, for it. In other respects, the estoppels or warranties of the drawer after acceptance are the same as those of the indorser.<sup>21</sup>

<sup>21</sup> *Ballingalls v. Gloster*, 3 East, 481; *Mason v. Franklin*, 3 Johns. 202; *Weldon v. Buck*, 4 Johns. 144; *Miller v. Hackley*, 5 Johns. 375; *Bank of Rochester v. Gray*, 2 Hill, 227.



### Facts Which Indorser is Estopped to Deny.

110. The indorser of a bill or note is estopped from denying, and warrants to his bona fide indorsee and to all subsequent bona fide holders:

- (a) That the bill or note is in every respect and as to all parties genuine, and neither forged, fictitious, nor altered.
- (b) That the bill or note is a valid and subsisting obligation, and that the contract obligations of all prior parties are valid.
- (c) That the prior parties were competent to bind themselves, whether as drawer, acceptor, maker, or indorser.
- (d) That he, as indorser, has a lawful title to the bill or note, and also a right to transfer it.

When we set the position of an acceptor and that of a drawer or indorser side by side, we see that the laws of estoppel in case of the latter have a wider scope. The drawer or indorser is estopped from denying all that acceptor is, but, by reason of the fact that his is a separate contract, the estoppel has a legal operation, distinct and apart from the contract evidenced by the terms in the body of the bill or note. It creates as distinct a liability as the separate covenants of a deed do. The estoppel, much more clearly than in case of acceptances, is a distinct contract right,—so to speak, a separate stipulation,—and more properly called a “warranty.” A clear idea of this can be obtained by comparing it to a chattel. Just as the vendor of chattels or the vendor of real estate

warrants certain things to be true of the property that he sells, so the indorser of a bill or note, putting it on the market by discounting it at the bank, or offering it in payment for goods sold, or circulating it in any way, guaranties or warrants that certain facts are true of that bill. And when the maker of a note or acceptor of a bill refuses to pay it, on the ground that it is forged or altered or usurious, or that the parties were infants, or that the bill had been stolen, the bank who has taken it, or the party who has discounted it for goods, turns upon the indorser who transferred it to him, and sues him upon his indorsement. And, when the indorser sets up some of these facts by way of defense, the holder answers, "I am suing you upon a separate contract in which you warranted these things to me," and the courts conclude the indorser from such a defense.

It is difficult to state this doctrine of so-called "implied warranty," as applied to bills and notes, with precision. It does not, for instance, wholly apply to one who transfers paper by delivery. Such a transferrer warrants the genuineness of the signatures; that the title is what it purports to be; that the paper is of the kind and description that it purports to be; that the parties to the paper are under no incapacity to contract, as from infancy or marriage or other disability; and that the transferrer has done nothing to prevent the transferee from collecting the paper. The reason given in such a case for forged paper is that it is nothing; that the transferrer has given nothing for the original consideration; and that, therefore, the bill or note may be rejected, and he may be sued upon the original consideration. But the reason in all cases other than those where the warranty is of title, and that the instrument is genuine, and not forged, is that the warranty is based upon a scienter. By this is meant that the implied warranty, when the bill or note is transferred by delivery, is upheld by the

general principle of sales,—that whenever an article sold has some latent defect, which is known to the seller and not to the purchaser, the former is liable for this defect, if he fails to discover his knowledge on the subject at the time of the sale. The courts, rather vaguely, it seems, say that, where knowledge is proved by direct evidence, the responsibility rests on the ground of fraud. Where the probability of knowledge is so strong that courts will presume the existence without proofs, the vendor is held responsible upon an implied warranty. The difference between the cases is that in the one the scienter is actually proved; in the other, it is presumed. Without knowledge of some sort in cases of instruments transferred by delivery, there is no warranty.<sup>22</sup> The language of the decisions summarized is that, where the maker or acceptor will not pay the note for any other reason than forgery, then the transferrer by delivery without indorsement is not liable for the defect in the instrument which prevents recovery upon it, unless he knew of, or can be presumed to have known of, that defect. If he knew of it, then the transfer was a fraud, and the transferrer is liable in an action for deceit. If he can be presumed to have known it, then a warranty is implied upon which the transferrer is liable.<sup>23</sup>

In thus dealing with the transferrer by delivery without indorsement, we are treating the bill or note as an ordinary chattel, or, more strictly speaking, as a chose in action. But where there is an indorsement, and the paper is forged, fictitious, or void for some such reason as that it is altered or usurious, then the warranty is placed upon a little different footing. A thoroughly con-

<sup>22</sup> *Littauer v. Goldman*, 72 N. Y. 506.

<sup>23</sup> *Delaware Bank v. Jarvis*, 20 N. Y. 226; *Herrick v. Whitney*, 15 Johns. 240; *Markle v. Hatfield*, 2 Johns. 455; *Heermance v. Vernoy*, 6 Johns. 5.



sistent theory would, of course, require that if the principal contract, set forth on the face of the instrument, is void *ab initio*, all the subsidiary contracts of indorsement depending upon it would also be of no legal effect, because they could never give life to a contract which had no existence. But legal theory is overruled by common sense. It is not always necessary that the principal contract to which a collateral contract of guaranty is added should be enforced in order that the contract of guaranty may avail.<sup>24</sup> A guarantor can sometimes be held, although no suit whatever can be maintained on the original debt; for it is sometimes the very essence of a guaranty that it is given because the principal debt cannot be enforced at law, as in cases where the guarantor undertakes to be responsible for goods to be supplied to a married woman or an infant. Neither does the fact that the guarantor cannot call upon the person for whom he has given his guaranty constitute any defense. The party to whom the guaranty is given has nothing to do with their mutual relations. This is the reason underlying<sup>25</sup> when the defendant indorsed the note of a married woman. The court construed the contract of indemnity implied from the indorsement to mean that the indorser would guaranty that the maker was competent to contract, and had legally contracted, the obligation purporting to be set forth in the note. The indorser guaranties the payment of the instrument, and, if it is not paid, he immediately becomes liable upon this guaranty.<sup>26</sup> The indorsement is a distinct contract, and whether the indorser knew of the defects in the instrument or not is immaterial. He is liable upon the contract of indemnity implied in it.<sup>27</sup>

<sup>24</sup> *McLaughlin v. McGovern*, 34 Barb. 208.

<sup>25</sup> *Erwin v. Downs*, 15 N. Y. 575.

<sup>26</sup> *Remsen v. Graves*, 41 N. Y. 471.

<sup>27</sup> *Turnbull v. Bowyer*, 40 N. Y. 456.



If the indorser knew of the defects, he is undoubtedly liable under the general principles of warranty.<sup>28</sup> If the indorser did not know of the defects, he is none the less liable in damages upon the construction of the general contract of indemnity he made when he indorsed the instrument.

The foregoing general principles apply to the classes mentioned in the principal text in this way: Where the bill or note is forged or altered, it is void, because in fact no such legal obligation was ever created. Money, therefore, paid upon the indorsement of such a bill or note, is governed by the same principle that governs other money paid under a mistake of fact. In other cases the equitable action for money had and received will lie against one who has received money which in conscience does not belong to him.<sup>29</sup> The holder of the bill or note offering it for discount must be deemed to hold out to the world that he is entitled to receive the amount of it from the parties primarily liable, and therefore he ought to know his own title and the genuineness both of the indorsements and of every part of the bill or note. He must be a guarantor of the genuineness of every preceding indorsement and of the genuineness of the instrument itself.<sup>30</sup> And so, when the maker or acceptor or a prior indorser has refused to pay a note or bill upon the ground that it is void because of forgery, usury, gaming, consideration, alteration, or the like, the holder, relying upon the so-called "warranty" of the indorser, may hold him upon his indorsement for the money paid to him for the instrument. The only exception and way of avoiding the effect of this stipulation implied in the indorsement is by

<sup>28</sup> McKnight v. Wheeler, 6 Hill, 492; Morford v. Davis, 28 N. Y. 481; Delaware Bank v. Jarvis, 20 N. Y. 226.

<sup>29</sup> Kelly v. Solari, 9 Mees. & W. 54.

<sup>30</sup> White v. Continental Nat. Bank, 64 N. Y. 316; Whitney v. National Bank of Potsdam, 45 N. Y. 305.

excluding, at the time of the transfer, by express terms, the warranty.<sup>31</sup> A general refusal to guaranty, as in case of an indorser without recourse, does not exclude the implied warranties. They are creations of law, and presumed, unless expressly and in words excepted. Likewise, an indorser cannot plead as a defense that the obligations of prior parties were ineffectual. When the instrument, for example, purports to be made by a copartnership, he cannot say that no such partnership existed;<sup>32</sup> nor is it a defense as to him that some prior party was a married woman;<sup>33</sup> nor that the instrument is invalid, because issued by a corporation for a purpose not authorized by its charter. The indorser has guarantied payment, and this very guaranty means, if it means anything, that the instrument is a binding obligation upon the makers, and that they were competent to contract in the manner they have contracted.<sup>34</sup> His guaranty is a distinct contract, and defenses existing between other parties to the instrument are irrelevant between him and his indorsee.

### Indorser Without Recourse.

**111. The warranties specified in the foregoing section apply to the indorser without recourse.**

The indorser without recourse and the transferrer of a bill or note by delivery stand upon much the same footing. So far as an indorsement and transfer is a promise of indemnity, neither the transferrer without indorsement nor the indorser without recourse promise to pay the instru-

<sup>31</sup> *Bell v. Dagg*, 60 N. Y. 528.

<sup>32</sup> *Dalrymple v. Hillenbrand*, 62 N. Y. 5.

<sup>33</sup> *Erwin v. Downs*, 15 N. Y. 575; *Archer v. Shea*, 14 Hun, 493.

<sup>34</sup> *Remsen v. Graves*, 41 N. Y. 471.

ment. In fact, the object of an indorsement without recourse is to relieve such an indorser from his obligation as a promisor of indemnity. He exempts himself by these words from his promise to pay if the parties antecedent to him do not. But because it is, in effect, a sale where the indorser, like the vendor of any chattel, warrants the title and genuineness of the thing to be what it purports, so it does not entitle him to indemnity if the instrument he transfers was forged or illegal, or not what it purports. This is for the same reason, and is governed by the same principles, already stated at length, which govern transfer by delivery.

### **Breach of Warranties and Damages Therefor.**

112. In case of the breach of any of these warranties, the indorser may be sued for the recovery of the original consideration.

113. To sustain an action for the breach of any of these warranties, there must be a consideration for the indorsement itself.

114. The measure of damages to be recovered against a drawer or indorser is:

- (a) On an inland bill, the amount of the bill, and interest and notarial fees.
- (b) On a foreign bill, the amount of the bill, interest, re-exchange, and expenses.

The general rule that the warrantor shall pay so much as the actual value of property falls short of what it would be worth if the warranty had been kept, applicable to warranties of quality or title of personal property, does not apply to bills and notes. With these negotiable instru-

ments the recovery of damages is limited to the amount paid out by reason of the breach of warranty, or else to refunding the consideration. The right upon which such an action rests is that upon which actions for moneys had and received also rest. The first element of such actions is that money or property has been received by the defendant to which in equity and good conscience he is not entitled, and the court, in its remedy, aims to restore just the property received, and neither more nor less. Thus, if the indorser proceeded against on the warranty is an accommodation indorser, he is not liable, because there is no consideration to support the implied contract. To apply the test we have just given: An action for moneys had and received would not lie, and hence the accommodation indorser, for instance, is neither a guarantor of the genuineness of an instrument,<sup>35</sup> nor liable in damages where a warrantor would in other instances be. In case of the warrantor upon a consideration, the damages are measured by the actual loss suffered. In *Delaware Bank v. Jarvis*<sup>36</sup> two courses are suggested: Where knowledge of the defect on the part of the warrantor can be shown, the bill or note may be returned as worthless, and an action may be commenced at once to recover back the money advanced upon it. This is for the reason that a contract procured by fraud may at once be rescinded by the injured party. The other course is to rely upon the warranty of the indorser, and, on being obliged to pay money or suffer loss, to hold the warrantor liable for damage incurred, including the costs incurred in defending the suit.<sup>37</sup> In the case of an express indorsement, it is immaterial whether there is knowledge on

<sup>35</sup> *Susquehanna Valley Bank v. Loomis*, 85 N. Y. 207.

<sup>36</sup> *Delaware Bank v. Jarvis*, 20 N. Y. 226.

<sup>37</sup> *Burt v. Dewey*, 40 N. Y. 283.



the part of the warrantor or not. He is liable upon his contract of indemnity. The measure of his recovery here, also, is the value of consideration, irrespective of the face of the instrument. The consideration may always be shown between these immediate parties, and the consideration proved always measures the amount of the recovery.<sup>38</sup>

### Accommodation Parties and Persons Accommodated.

115. **AN ACCOMMODATION PARTY**—Means a person who has signed a bill or note as acceptor or drawer, maker or indorser, without recompense, and for the purpose of lending his name to some other person as a means of credit.

116. The accommodated party impliedly contracts:

- (a) That he will pay the bill or note.
- (b) That he will repay the accommodation party for all loss incurred, if that party is compelled to pay in case of his default.

117. The accommodation party is liable to all parties except the party accommodated.

As between the accommodated and accommodation party, the paper is given gratuitously. Between them there is no binding contract, because the accommodation paper is not based upon a consideration. But subsequent parties, who discount the paper, are on a different footing. With them, not only the accommodated, but also the accommoda-

<sup>38</sup> Brown v. Mott, 7 Johns. 361; Braman v. Hess, 13 Johns. 52; Rapelye v. Anderson, 4 Hill, 472.

tion, party may be considered as entering into a contract upon a consideration, for the accommodation party has offered to all the world to loan his credit upon the instrument. The parties who, subsequent to the offer, have discounted the instrument, have accepted that offer and paid for it. Thus, in accommodation paper there are three classes of relations to be considered:

(1) What is the liability upon the paper of the accommodating party to the person for whose accommodation he has given it?

(2) What is the liability upon the paper of the accommodated party to the accommodation party? And

(3) What is the liability upon the paper of the accommodating party to all the other parties who take it?

In case of a bill, if the acceptance be for the drawer's accommodation, the acceptor does not thereby become entitled to sue the drawer upon the bill; but when he has paid the bill, and not before, he may recover back the amount from the drawer in an action for money had and received.<sup>39</sup> This is equally the case with the accommodation maker of a note. He cannot sue the payee for whom he makes the accommodation. In either case, only the amount paid by the accommodation party can be recovered. The reason for this is that, the maker and acceptor of the instrument being the ultimate parties to it, when the instrument is paid by them it is extinguished, and no longer exists as a valid instrument. Therefore, the instrument not being in existence, the acceptor or the maker cannot recover upon the instrument itself. The principle is the same when the accommodation party is subsequent to the party for whom he gives the accommodation as where the accommodated party is the maker of a note and the accommodation party

<sup>39</sup> *Pearce v. Wilkins*, 2 N. Y. 469.

is payee. There, the instrument being without consideration as between the payee and the maker, the accommodation party cannot sue the accommodated party, because the instrument, as between them, is without consideration and a nudum pactum. The accommodated party can in no case look to the accommodation party, for the reason that the obligation, as between them, is without consideration and a nudum pactum; and also that the purpose of the instrument was that the accommodation party should give it "the security" of his name. This being the intention of the obligation, no action will lie in behalf of the party to whom accommodation is given.

These relations between the accommodated and accommodation parties do not invalidate it as to third parties. Knowledge of the mere want of consideration between the original parties will not alone prevent the purchaser from becoming a bona fide holder. Accommodation paper is daily placed in the market for discount or sale, and the indorsee or purchaser who knows that a bill or note was drawn, made, accepted, or indorsed without consideration is as much entitled to recover as if he had been ignorant of the fact. This rule is subject to modifications. In New York, for instance,<sup>40</sup> the authorities depart from the well-established and probably wiser English rule. An accommodation indorser is discharged by the transfer of a note after maturity, because it is considered unfair to treat an accommodation indorsement as a continuing guaranty. It was not the intention of the accommodation indorser to be liable upon his indorsement for all time. It was only his intention to give indemnity to such persons as took the note during the time when, by its terms, it was supposed to circulate, or, in other words, up to the time of the maturity

<sup>40</sup> Chester v. Dorr, 41 N. Y. 279.

of the note. And it would be contrary to the intention of the parties and unwarrantable to create extensions of time after the note had become due. This modification prevails also in Pennsylvania and Massachusetts. It is in direct contradiction to the English and to the common-law rule.<sup>41</sup>

Another modification is in case of what is called "diversion." It often happens that one business man tells a second that he wants to borrow his credit for a specified purpose, and, to further that purpose, the second man accepts a bill, or makes or indorses a note for the first to discount. This arrangement amounts to an agreement between them that the instrument shall be devoted to that especial purpose. And the questions arising upon the diversion of accommodation paper are mainly whether the instrument has been used for the purpose for which it was given or not.

The cases make a distinction between material and immaterial diversion. A material diversion has these elements: (1) The accommodation party must have some interest in the application of the money raised on the bill or note. Unless he has, he is not in a position to object that there has been a misapplication of the paper on which he is the accommodation party. (2) The accommodation note must be made for some substantial specific purpose, and be diverted to some other purpose.<sup>42</sup> An immaterial diversion is where an accommodation note is made for the purpose of loaning the parties credit generally, or where the substantial design for which the instrument was given is not departed from, or where the express agreement for which

<sup>41</sup> *Charles v. Marsden*, 1 Taunt. 224; *Sturtevant v. Ford*, 4 Man. & G. 101; *Carruthers v. West*, 11 Q. B. 143.

<sup>42</sup> *Bank of Rutland v. Buck*, 5 Wend. 66; *Kasson v. Smith*, 8 Wend. 437; *Spencer v. Ballou*, 18 N. Y. 327; *Schepp v. Carpenter*, 51 N. Y. 602.



the instrument was given and which is broken is not one of substance and unimportant. An immaterial diversion cannot avail as a defense. A material diversion is thus, in effect, in the nature of a contract, based upon a consideration. There is some substantial interest at stake which makes it binding upon the accommodated party to carry out its purpose. If he fails to do this, the reason for its being given fails. It then becomes the duty of the person having it in possession to return it. The parties to it are discharged, because it is no longer a contract. If, in defiance of the agreement, the note is misapplied, then it is a fraud, which, as in the case of other contracts, vitiates the agreement between parties and privies, and against the defense of which the courts will allow no recovery.<sup>43</sup> The purchaser of accommodation paper obtained by fraud, deception, or fraudulently misapplied, with notice of these facts, is not a bona fide holder, but rather, if he attempts to recover upon the paper, is a partaker in the fraud. The same rule prevails in case of business paper.<sup>44</sup> The purchaser of accommodation paper with mere notice of accommodation is a bona fide purchaser.<sup>45</sup> A bill is accepted or note made for accommodation of another for the purpose of furnishing a guaranty. The fact that all the world knows it was a guaranty without consideration is immaterial; and, if the accommodation party seeks a defense in saying that it is accommodation paper, it will not be necessary for the holder to show on his part, in rebuttal, that he gave value for it.

<sup>43</sup> *Denniston v. Bacon*, 10 Johns. 196.

<sup>44</sup> *Small v. Smith*, 1 Denio, 583; *Wardell v. Howell*, 9 Wend. 170; *Brown v. Taber*, 5 Wend. 566; *Farmers' Bank v. Noxon*, 45 N. Y. 762.

<sup>45</sup> *Grant v. Ellicott*, 7 Wend. 227; *Brown v. Mott*, 7 Johns. 361; *Montross v. Clark*, 2 Sandf. 115; *Bank of Rutland v. Buck*, 5 Wend. 66.

Carrying in mind that accommodation paper is a mere loan of credit, or, as it sometimes is put, a loan of money, the purchaser being the lender, and the seller of the paper the borrower,<sup>46</sup> it is easy to reach the next logical step in the theory. Where there is no limitation or restriction as to the manner in which accommodation paper is to be used, the accommodated party is at liberty to sustain his credit with it in any way he chooses. He may appropriate it to any purpose. In such a case there can be no substantial material diversion;<sup>47</sup> and, even when there is a departure from the express directions of the accommodation party in regard to the note, it will sometimes not amount to a material diversion. The accommodation party may, for instance, direct it to be discounted at one bank, and the accommodated party may discount it at another,<sup>48</sup> and generally, if the paper has accomplished the purpose in the minds of the parties at the time of giving the accommodation and answers the test that it has in no wise changed the responsibility of any of them, the diversion will be disregarded by the courts and deemed immaterial.

### PROBLEMS.

(1) D is the holder of a bill already indorsed in blank. He indorses it to E. Does D incur the liabilities of an indorser?

(2) A bill purporting to be drawn by A on B, in favor of C, is accepted by B, and then negotiated. May B set up that A's signature is a forgery?

<sup>46</sup> *Claffin v. Boorum*, 25 N. E. Rep. 360, s. c. 122 N. Y. 385; *Clark v. Sisson*, 22 N. Y. 312; *Newell v. Doty*, 33 N. Y. 83.

<sup>47</sup> *Cole v. Saulpaugh*, 48 Barb. 104; *Seneca Co. Bank v. Neass*, 3 N. Y. 442; *Grandin v. Le Roy*, 2 Paige, 509; *Mohawk Bank v. Corey*, 1 Hill, 514; *Agawam Bank v. Strever*, 18 N. Y. 502.

<sup>48</sup> *Powell v. Waters*, 17 Johns. 176; *Bank of Chenango v. Hyde*, 4 Cow. 567.

(3) A draws a bill on B, who has no funds of A in his hands. B accepts it, to enable A to raise money. It is negotiated. Is this accommodation or business paper?

(4) A customer, having a balance of \$200 at his banker's, draws a check for \$100, or accepts a bill for \$100, payable at his banker's, and instructs his banker to pay it. If this check or bill is dishonored, what remedy has he?

(5) Plaintiff purchased from defendant the supposed note of W, giving his own in exchange. The former was a forger. Plaintiff sues for amount paid for forged note. Can he recover?

(6) A draws a bill on B against a running account. B accepts. The balance was against A when the bill was drawn, when accepted, and when payable. Is this business or accommodation paper?

(7) A bill is drawn by A on B, in favor of C. C alters the amount from \$10 to \$100, and then indorses it away. B subsequently accepts it. May B set up the alteration as a defense?

(8) A signs a bill as drawer to accommodate the acceptor. It is dishonored. A receives no notice of dishonor, but, nevertheless, pays half the amount of the bill to the holder. Can A recover this sum from the acceptor? If so, upon what ground?

(9) A draws a bill on B. B accepts for value. C, whose name is well known, indorses the bill to give it currency. As regards A and B, is this business or accommodation paper? What kind of an indorser is C?

(10) D, the holder of a note payable to bearer, discounts it with E. The maker defeats the suit of E, on the ground that the note was usurious. E sues D to recover the money he paid. The latter knew nothing of the usury when he transferred the note. Can E recover? Why?

(11) A bill is payable to C's order. His indorsement is forged. D, a subsequent holder, presents the bill for acceptance. The drawee accepts it, payable at his bankers'. The bankers pay D without order from the acceptor. Can the acceptor recover the moneys so paid?

(12) A draws a bill on B, in favor of C. It appears that B was indebted to C, and that A drew the bill to accommodate B. Is this business or accommodation paper as regards A? As regards B and C?



(13) A draws a bill on B, payable to C's order. C is a fictitious person. B accepts in ignorance of this fact. A then indorses the bill in blank in C's name, and discounts it with D, who has notice. D sues B, who sets up the foregoing facts. Can D recover?

(14) A bill purporting to be drawn by A on B, payable to C's order, and indorsed by C in blank, is held by D. X accepts it *supra* protest for A's honor. D, who is a bona fide holder, sues X. It turns out that A's signature was forged, and that C is a fictitious person. X sets up these facts in defense in a suit by the holder. Will they avail him?

(15) The drawer of a bill indorses it to C, who has undertaken to be answerable for the price of goods supplied to the acceptor. C then indorses the bill back to the drawer. Can the drawer, in his character of indorsee, sue C as indorser?

(16) C discounts with D a bill payable to bearer without indorsing it. It turns out that, unknown to C, the amount of the bill had been fraudulently altered by a previous holder. D sues C for moneys had and received. Can he recover?

(17) A draws a bill on B, in favor of C, and remits funds to meet it. B does not accept the bill, but he tells C that he has received the funds and promises to pay the bill. B does not pay the bill. What recourse against the parties has C? Can he maintain an action on the bill against B?

(18) A, in a foreign country, draws on B, in England, under a letter of credit. B dishonors his draft. What remedy and damages has A?

(19) D, the bona fide holder of a bill purporting to be drawn by A, accepted by B, and indorsed in blank by C, discounts it. The signatures of A and B were forgeries, and C, whose indorsement was genuine, is insolvent. The holder sues D to recover the money he paid for the bill. Can he recover? Why?

(20) A draws and indorses, and B accepts, a bill for the accommodation of X, who is not a party thereto. A and B receive a commission for so doing. Is this accommodation or business paper?

(21) B accepts a bill to accommodate the drawer, but is not provided with funds to pay it. There is some *prima*



facie defense against the holder. B is sued, defends the action, and has to pay the amount of the bill and costs. Can B recover from the drawer the amount he paid?

(22) The acceptor of a bill forges A's name thereon as drawer; then discounts it with a bank. The bill is dishonored, and notice sent to A. The acceptor gets the bill renewed, and, on the renewal, again forges A's name as drawer. The renewed bill is dishonored, and notice sent to A. On suit, one month after, A sets up that his signature was forged. Is this a defense to an action by the bank?

(23) B's acceptance to a bill is forged. A holder who takes it bona fide afterwards writes B to inquire whether the acceptance is his. B writes back to say it is. The holder sues B on the acceptance. Can he recover?

(24) B and C are indebted to A. A draws a bill for the amount on B, payable to his own order, and indorses it in blank. B accepts the bill. C also writes his name on the face of the instrument. May C be sued as indorser? Is this business or accommodation paper?

(25) A draws a bill on B, payable to C's order. C is a fictitious person. B, knowing this, accepts. A indorses the bill in blank in C's name, and it is negotiated to D, a bona fide holder for value without notice. D sues B. Can he recover? Assuming B knew nothing of C's being a fictitious person, would it change your opinion? Why?

## CHAPTER VI.

## TRANSFER.

- 118-119. Definition and Methods.
- 120-121. By Indorsement.
- 122-124. Instruments Payable to Bearer and Indorsements in Blank.
  - 125. By Operation of Law.
  - 126. Overdue Paper.
- 127-128. Validity of Indorsement between Immediate Parties.

## Definition and Methods.

118. The transfer of instruments is their negotiation according to the forms of law.

119. There are four methods of transfer :

- (a) By indorsement.
- (b) By delivery.
- (c) By assignment.
- (d) By operation of law.

In beginning the study of the transfer of negotiable instruments, the student enters upon the second great division of the subject.

Thus far we have been considering the four classes of contracts embodied in negotiable bills and notes. They are the contracts embodied on the face of the bill and of the note, the contracts embodied in the acceptance of bills, and the contracts embodied in indorsement of bills and notes. We have examined the elements necessary to constitute each of those classes of contracts. We have examined the nature and extent of the obligations that were assumed by their parties, and, because these rules applied to negotiable bills and notes, we examined and discussed

negotiability, its peculiar immunities, and the reasons for it, and in what ways negotiable instruments were distinguished from non-negotiable ones. We saw that the doctrines of negotiability had peculiar reference to the circulation of the instruments, and particularly to their circulation as an equivalent for money. With the rules of transfer we are to consider the rules affecting that circulation. They are divided into three general topics: (1) The common rules affecting the circulation of the instrument from hand to hand, and particularly how far certain rules relating to consideration affect this transfer; (2) defenses which may or may not be interposed to an instrument in its circulation; and (3) the position of a purchaser for value without notice.

### By Indorsement.

120. The legal title to an instrument made payable to order can regularly be transferred only by indorsement.

121. The transferee of an instrument made payable to order without indorsement takes it subject to all the equities vested in prior parties against his transferor, even though the bill is subsequently indorsed or ratified, and he was a bona fide holder for value.

In case of transfer of a negotiable instrument, the first question naturally is whether it is to be transferred by indorsement or delivery; and, if by indorsement, what is the method of indorsement to be followed. A question naturally connected with this is, what is the position of the lawful holder of an unindorsed instrument, payable to order? The fact which determines whether the instrument

is to be transferred by indorsement or not, is the character of the terms of the face of the instrument, whether it be to order or not. If it be to order, then it was in contemplation of the maker or acceptor of the instrument that the money called for was to be paid to the payee, or to some person to whom he would direct it to be paid. It would be a violation of the terms of the contract to pay it to any person except the payee, or one to whom he orders it paid, and this order is evidenced by the indorsement.<sup>1</sup> It may be evidenced in various forms. A skillful analyst has arranged and stated them as follows:

- (1) If payable to A, A must indorse.
- (2) If payable to A, and he is dead, B, as executor of A, must sign.
- (3) If payable to A, and he is bankrupt, B, as assignee of A, must sign.
- (4) If payable to A, B, C, and D, executors of A, all must sign.
- (5) If payable to A, wife of B, B must sign.
- (6) If payable to A, B, C, and D, a copartnership, any member by the firm name may sign.
- (7) If payable to A, B, C, and D, not partners, all must sign.

There is a large class of cases where, through accident, forgetfulness, or mistake, a negotiable instrument is transferred in good faith, but without the indorsement of the person to whose order it is made. It is true that an indorsement and an assignment of an instrument are widely distinct. But the statute of Anne, while it distinguishes between them, recognizes the latter method as one competent to transfer the instrument itself.<sup>2</sup> If the bill is

<sup>1</sup> Cock v. Fellows, 7 Johns. 143; Hedges v. Sealy, 9 Barb. 214.

<sup>2</sup> Watkins v. Maule, 2 Jac. & W. 237; Harrop v. Fisher, 9 Wkly. Rep. 667, 10 C. B. (N. S.) 196.



originally payable to a person or his order, then it is properly transferable by indorsement. In no other way will the transfer convey the legal title to the holder. But it was the doctrine of the courts of equity, as distinct from those of the common law, that, inasmuch as property in equity could be assigned without a writing, and merely by delivery, with an oral agreement to assign and an intent to assign, therefore a court of equity would treat a delivery of the bill or note payable to order, without indorsement of it, as an assignment of it, or a transfer of the title of the note and all interest to it. And, further, because it was only the courts of equity which would treat it as such an assignment, and vest the interest and right to the bill or note in the transferee, therefore a corresponding equity would admit of reasons or defenses to show why the bill or note should not be paid. Hence the doctrine that a transferee of a note made payable to order without indorsement takes it subject to all equities attached to the note; and this although the bill be subsequently ratified or indorsed, and the holder was a bona fide holder for value. This doctrine only goes to this limit that equities are admitted. The transferee stands in the position of an assignee. He owns the note. He, in turn, may transfer it, but he owns it and transfers it subject to the rules applicable in case of an assignment of any other chose in action. The ratification by indorsement may be made at any time afterwards, and, if equities have not then accrued, the title becomes good. The note is then taken free from defenses subsequently accruing, but the note is open to all prior equities attaching before that time.

### **Instruments Payable to Bearer and Indorsements in Blank.**

122. When the note or bill is made or becomes payable to bearer, it is transferable by delivery without indorsement. The transferrer incurs no liability on such a transfer.

123. A bill or note payable to bearer may be indorsed in full; but, if so indorsed, its negotiability is not restrained except as to the indorser in full, against whom title must be made through his special indorsee.

124. Where there are successive indorsements in blank, the holder may fill up the first or any subsequent one to himself, or he may deduce his title through all of them.

A note payable to bearer and an indorsement in blank are, in legal effect, the same. The contract in the case of the note payable to bearer imports that the maker or acceptor is willing to pay any one who may have it in his possession. The indorsement in blank signifies the same thing with regard to an indorser making it. What now is the effect of injecting a special indorsement into a contract of this general nature?

There is no theoretical objection to injecting a special indorsement upon an instrument payable to bearer or under an indorsement in blank. It merely limits the person or class of persons to whom an indorser signifies that he is willing to pay the instrument. Such an indorser says, in effect, "I will pay my indorsee, and such person as he directs." Hence, to recover against such an indorser,

title through his indorsee must be proved by proving his indorser's signature. An indorsement in blank is a general power to the lawful holder to write over it any contract not inconsistent with what may be supposed to have been in the mind of the indorser when he wrote his name on the instrument. He may treat any indorsement as transferring the instrument to himself, and may change it to a form to express this intention. The reasons and authorities for these positions have been already given.

### By Operation of Law.

125. While, in general, indorsement or delivery is essential to the passing of the full title to a bill or note, there are cases where it passes without either indorsement or delivery by operation of law. Some of the cases are:

- (a) The death of the holder, where the title vests in his personal representative.
- (b) The bankruptcy of the holder, where the title vests in his assignee.
- (c) In some jurisdictions, where the holder is an unmarried woman, on her subsequent marriage, the title vests in her husband.
- (d) In some jurisdictions the title to a bill or note transferred to a married woman vests in her husband.
- (e) Where a member of a partnership which is the transferee of a bill or note dies, the title vests in the surviving members of the firm.

### Overdue Paper.

126. Negotiable paper may be transferred by indorsement or delivery when overdue.

**EXCEPTION**—An accommodation party is not liable in some jurisdictions to a transferee after the paper is due.

Questions relating to overdue paper more commonly arise when such paper comes into the hand of the innocent holder. Such questions we shall classify and give the rules concerning hereafter. Here it is only pertinent to speak of the position of the various parties to the instrument transferred when overdue.

That a bill or note does not lose its negotiability by dishonor, is the doctrine in case after case. Such, for instance, are the words of Judge Hurlbut in *Leavitt v. Putnam*.<sup>3</sup> And yet, by a curious anomaly as regards parties prior to the transfer, many of the privileges of a bona fide holder who receives the paper after maturity are destroyed. Defenses of payment, of fraud, of illegality and failure of consideration, may be successfully interposed in an action on a bill or note brought by the transferee of overdue paper when they would have availed against his transferrer. As Professor Ames points out, a negotiable instrument overdue becomes a mere chose in action or ordinary contract.

There are some singular things concerning overdue paper viewed as a chose in action. Prominent among these is the fact that it is transferred by indorsement, and not by assignment. The reason for this<sup>4</sup> is that the parties to the

<sup>3</sup> *Leavitt v. Putnam*, 3 N. Y. 494.

<sup>4</sup> *Leavitt v. Putnam*, 3 N. Y. 494.



original contract contemplated a payment to order. An indorsement signifies that order, and transfers the instrument. In *Colt v. Barnard*<sup>5</sup> Chief Justice Shaw explains that each indorsement ratifies the original contract on the face of the instrument, and is in the nature of a new draft by which the holder orders the maker to pay the contents to the indorsee, not, indeed, when the instrument by its terms became due, but within a reasonable time. Other authorities deem it similar to an inland bill of exchange, drawn by the indorser on the acceptor of the bill or the maker of the note, payable to the indorsee at sight or on demand. And, by analogy, the duty of the indorsee of such an instrument, if he would hold the indorser, is generally determined.<sup>6</sup> An indorser is liable as such if the holder performs his duty in demanding the payment in a reasonable time. By this is meant such a time as would, from the particular circumstances of each case, be allowed in the general conduct of affairs by business men.

The indorsee of a negotiable bill or note after maturity takes the same, and only the same, interest that his indorser had. This is because it is a mere chose in action. He buys the right of action which the indorser had to sell. He buys not only the right of its enforcement, but also the defenses to it.<sup>7</sup> To give expression to common business phrase, he buys a lawsuit for whatever it is worth, with the chances of its success or failure, as events may turn.<sup>8</sup> The reason, as will be shown under the subject of "Notice," is that, when an indorsee takes an instrument overdue, it is presumed he was acquainted with, or had notice of, the

<sup>5</sup> *Colt v. Barnard*, 18 Pick. 260.

<sup>6</sup> *Byles, Bills*, p. 169, note; *Patterson v. Todd*, 18 Pa. St. 426; *Tyler v. Young*, 30 Pa. St. 144.

<sup>7</sup> *Folsom v. Bartlett*, 2 Cal. 163; *Wheeler v. Barret*, 20 Mo. 573.

<sup>8</sup> *De Mott v. Starkey*, 3 Barb. Ch. 403.

circumstances which would affect the validity of it, had it been in the hands of the person who was the holder at that time.<sup>9</sup> He cannot be treated as a purchaser without notice, because the fact that the instrument has not been paid when the acceptor or maker promised it should be paid implies that there is some reason for its non-payment. And whether he has inquired for this reason or not is immaterial. He should have made such inquiry, and the law will hold him to have made it. He is charged with notice of all facts and defenses he would have found out had he made the inquiry.

But there is a limitation to this rule. It is that, if defenses are not available against the assignor or indorser of the overdue paper, then the assignee or indorsee is protected against them. If the right of action is perfect in the assignor or indorser, the assignee or indorsee buys that right of action, and all of it. If it is in all things complete, he buys it in its completeness. It is immaterial that indorsers and transferrers, prior to the indorser after maturity, had notice, and were not in the position of the bona fide holder. If the indorser after maturity was a bona fide holder for value, the instrument was good in his hands, and was free from these defenses. A part of his title to the instrument was his power of transferring to others with the same immunity. At the first bona fide negotiation, all defenses between original parties and parties having notice cease to be valid.<sup>10</sup>

In some jurisdictions, and particularly in New York, the fact that paper is accommodation paper, without other rea-

<sup>9</sup> Williams v. Matthews, 3 Cow. 252.

<sup>10</sup> Haskell v. Whitmore, 19 Me. 102; Chalmers v. Lanion, 1 Camp. 383; Smith v. Hiscock, 14 Me. 449; Solomons v. Bank of England, 13 East, 135, note; Miller v. Talcott, 54 N. Y. 114; Britton v. Hall, 1 Hilt. 528.

son, constitutes a defense when that paper is transferred when overdue. This is in contravention of the common law. It is probably the common law that the courts will not construe a contract to be implied in accommodation paper not to negotiate it after it becomes due. There must be express words to that effect at the time of the giving of the accommodation. This is because it is deemed the public policy that nothing outside the bill should affect an indorsee for value. The loan of credit given by the accommodation party was indefinite in regard to the extent of the time of its operation.

There is a criticism to be made upon this doctrine of the common law.<sup>11</sup> And they are followed by the early New York cases.<sup>12</sup> It is an English rule, and has a curious history. It came up before the courts on questions of pleading, and it certainly seems not too much to say that the courts appear to have decided the matter without giving it a very thorough consideration. In *Sturtevant v. Ford* the judges held themselves bound by the principle of stare decisis, though they criticised the rule; and it is submitted with deference to the weight of authority on the point that the English doctrine, as it is followed in several states of the Union, is not the wiser view.

The true view of the position seems to be that taken in New York, where the purpose of accommodation making, accepting, or indorsing is declared to be to lend credit to the accommodated party for the term of the instrument. In the case of an indorsement, it is guarantied that it shall be paid at maturity. If not paid at maturity, then the con-

<sup>11</sup> *Charles v. Marsden*, 1 Taunt. 224; *Stein v. Yglesias*, 3 Dowl. 252; *Sturtevant v. Ford*, 4 Man. & G. 101.

<sup>12</sup> *Brown v. Mott*, 7 Johns. 361; *Grant v. Ellicott*, 7 Wend. 227.

tract for payment is broken, and the bill or note becomes a mere chose in action, which may be transferred as a cause of action, but not as a bill or note. If the cause of action was valid in the hands of the holder, then it may be enforced; but, if defense of want of consideration could be raised against such transfer, then it could not be enforced. If the accommodated party against whom the defense of want of consideration can be raised indorses the paper when overdue, the bona fide holder cannot recover.<sup>13</sup> This in no way varies the rule that, if the title to the accommodation paper when it becomes due is in some person against whom the defense of want of consideration will not avail, then, on his transfer of it as a chose in action when the paper is overdue, his assignee takes the title which he himself had. An accommodation party cannot raise the defense of want of consideration against a transferee of overdue paper who procures it from a bona fide holder who, in his turn, procured the paper before it became due.<sup>14</sup>

### Validity of Indorsement between Immediate Parties.

**127.** As between immediate parties or parties privy, any cause which would invalidate an ordinary contract will invalidate the contract of indorsement, because the indorsement is itself an independent contract.

**128. IMMEDIATE PARTIES** — Means parties who are immediately connected with each other. Other parties are commonly spoken of as "remote."

<sup>13</sup> Chester v. Dorr, 41 N. Y. 279.

<sup>14</sup> Eckhert v. Ellis, 26 Hun, 663.



A negotiable instrument containing several indorsements is an aggregate of independent contracts. It often evidences as many distinct business transactions as there are indorsements. Each distinct transaction may be widely different from every other; and the legal relations of the parties to every individual transaction may be as widely different as the transactions themselves are distinct. Ordinarily, the instrument itself shows the parties who participated in a single transaction. They are technically spoken of as "immediate parties." Parties who participated in different transactions are called "remote."

Ordinarily too, the instrument itself shows to which class these parties belong. The maker and payee of a note, the drawer and acceptor of a bill, the indorser and immediate indorsee of a note or bill, the drawer and payee of a bill, are immediate parties. The indorser and maker of a note, or the indorsee and one who is not his immediate indorser, or the payee and acceptor, are remote parties. And the conclusion to be drawn from the instrument itself is that the maker and payee of a note, for instance, participated in one transaction, while the third and fourth indorsers participated in another, and perhaps a widely different one. This is merely a presumption, and not of very much effect, for sometimes the instrument does not show who are the immediate and who the remote parties. In such cases the ostensible and real relations of the parties may be shown. Thus, in *Powers v. French*,<sup>15</sup> an accommodation note was both made and indorsed for accommodation; then delivered, without consideration, to the plaintiff. The court said that the real relation of the maker and indorser could be shown, and that the lack of consideration was a complete defense. The mere position of these

<sup>15</sup> *Powers v. French*, 1 Hun, 582.

parties on the paper, as maker and indorser, did not in fact make them so to such an extent that the true nature of the transaction could not be given in evidence.

It once being determined whether the parties to an instrument between whom there is controversy are immediate or remote, it then becomes clear whether the general rules of law applicable to contracts, or the peculiar rules and equitable theories applicable to negotiable bills and notes, apply. If the parties are immediate, and the controversy is between them as parties to a distinct contract, then any defense which is sufficient to prevent the enforcement of an ordinary contract will prevail. To them the theories of the purchaser for value do not apply, for it is no part of the theory of negotiability that it should give immunity to the person who has procured the instrument through fraud or misrepresentation or duress, or through an illegal consideration, or who has found or stolen it. Negotiability, as a theory, only aims to protect innocent parties, who have taken the instrument in ignorance of the existence of these defenses, affecting some contract embodied in the instrument before the innocent party takes it. Therefore an immediate party to a contract who has been guilty of fraud, misrepresentation, and duress must suffer the penalty as against him upon whom he has committed such a wrong.

In general, where the parties are remote, then the theories of negotiability apply. The fact of importance in the doctrine of negotiable instruments is what it is necessary for the law to presume in favor of the purchaser for value without notice in order to preserve the instrument as a circulating medium. The remote party is one, therefore, who knows nothing of the facts of defense which have arisen between immediate parties. He has not contracted with them, and knows nothing of their transactions. He is to be protected in paying money or giving value for the

instrument from the wrong other parties have committed. The wrong which has tainted their contract does not vitiate his. He stands in the position of one fortified by the doctrines of equity, who will be protected by courts, because the loss was not occasioned by his act, but rather that of some prior party of whom he knows nothing.

### PROBLEMS.

(1) Bill payable to "C and D, or the order of either." C alone indorses it to E. Is this sufficient?

(2) C, the holder of a bill payable to order, transfers it to D, for value, without indorsing it. Can D sue the acceptor in his own name, in a state where there is no statute empowering it? Can D indorse it to E?

(3) B, for an illegal consideration, makes a note payable to C, or order. C indorses it, when overdue, to D. Can D recover of B? Give reasons.

(4) C, the holder of a bill payable to order, dies, having specifically bequeathed it to X. X, without obtaining an indorsement of the bill to himself by C's executor, indorses it to B, for value. Can B sue the estate of C?

(5) A draws a bill on B, payable to C, or order. A is induced to do so by C's fraud. C transfers the bill to D for value, but does not indorse it. After this, he obtains C's indorsement. Can D recover from A if he had obtained C's indorsement before he had notice of the fraud practiced on A? How would it be if D had received notice of the fraud before he obtained C's indorsement?

(6) B accepts a bill payable to the "order of C and D." D alone indorses it to E. Can E sue B?

(7) C, the holder of a bill payable to order, dies. Can A, as administrator of C, enforce payment of it? Can A indorse it away, using his own name?

(8) A note is made payable to the order of C, a married woman. Her husband indorses it in his own name. Is this a valid indorsement?

(9) B, for an illegal consideration, accepts a bill drawn on him by A. A indorses it before maturity to C, who takes

it for value and without notice. C indorses the bill, when overdue, to D. Does D acquire a good title? Could C give a good title to A?

(10) Bill payable to the order of C, a single woman. C marries D. C, after marriage, indorses the bill to E, without her husband's consent. Is the indorsement valid? D indorses the bill, using his own name. Is this valid?

(11) B makes a note payable to C or order. C transfers it to D for value without indorsing it. After the note is overdue, D obtains C's indorsement. The note in its inception was tainted with fraud between B and C. Can D recover against B if he proves the fraud?



## CHAPTER VII.

### DEFENSES COMMONLY INTERPOSED AGAINST A PURCHASER FOR VALUE WITHOUT NOTICE.

- 129-132. Real and Personal Defenses.
- 133-135. Usury.
- 136-139. Alteration of Instrument.
  - 140. Material Alterations.
  - 141. Fraud.
  - 142. Duress.
  - 143. Consideration.
- 144-145. Want or Failure of Consideration.
  - 146. Illegal Consideration.
  - 147. Lunacy or Drunkenness.

#### Real and Personal Defenses.

129. The defenses which are commonly interposed by a party to a bill or note in a suit brought by a holder of the note against him are of two classes:

- (a) **REAL**—Or those which grow out of some defect inherent in the instrument itself.
  - (b) **PERSONAL**—Or those acts which between privy parties would invalidate the transfer or prevent the enforcement of the instrument, but which do not attach to or invalidate the instrument.
130. Common real defenses are—
- (a) The incapacity of the defendant to make the instrument.
  - (b) Those for which statutes declare the instrument void.

- (c) Those where the instrument is altered in a material respect.
- (d) Perhaps lunacy or drunkenness.

131. Personal defenses are in general founded upon the agreement or conduct of a particular person with reference to the instrument, by reason of which the courts will not enforce the instrument in favor of the holder committing the wrong, or of subsequent holders who took the instrument with knowledge of the first holder's wrongful act.

132. Common personal defenses are:

- (a) Fraud.
- (b) Probably duress.
- (c) Lack or failure of consideration.
- (d) Illegality which does not render the instrument void.
- (e) Payment.
- (f) Perhaps lunacy or drunkenness.

The next two chapters develop, as far as can here be developed, the unique position in contract law of the purchaser for value without notice. He stands alone, in that the law will enforce his rights against certain defenses, which would avail against him were they interposed in any other kind of contract than a negotiable instrument. It is not sought to give a statement of all the defenses involved in cases of commercial paper. It is neither desired nor possible to give an adequate statement of all the defenses which are interposed against even a bona fide holder. What is aimed at is to classify only the common defenses, and to state the main rules concerning them, and the reasons for these rules. It is believed that for this purpose

the classification of Professor Ames is the most scientific and the best yet made. That, therefore, has been adopted. In general, the classification shows that a bona fide holder can recover when the defense interposed is a personal defense. When, on the other hand, the defense is a real defense, he cannot recover. In the case of immediate parties, all defenses are available, because each independent contract is governed by the general laws of contract. In the case of remote parties, where the holder enforcing the instrument is a purchaser for value without notice, a personal defense cannot be successfully interposed, and only the real defenses are allowed by the courts.

The common real defenses are incapacity to contract, avoidance *ab initio* of the contract, and the destruction of its legal effect as an evidence of the intention of the parties.

Common personal defenses are fraud, duress, lack, failure or illegality of consideration, and discharge of the instrument. Some of these defenses are so peculiarly within the generic law pertaining to them that, further than a mention under their particular division, no discussion of them is given. Such are infancy, payment, fraud, and the like. Real and personal defenses are here set side by side, that the student may at the entrance of the subject see how widely different is their nature.

With real defenses the instrument, as a legal entity, has never existed, or has ceased to exist. They are called "real defenses" because they attach to the *res* or thing, irrespective of the conduct or agreement of the parties to it. It cannot be enforced by the holder because there is no instrument to enforce. Personal defenses, in contrast to this, are founded upon the act, conduct, or agreement of the parties with reference to the instrument. The instrument with them has a legal inception, and, as an instrument, is a perfectly binding obligation. But, as between imme-

mediate parties, the courts will not grant a remedy, because the plaintiff in the action—the party seeking its enforcement in the suit—has violated some right, or failed in some duty, so that he has no standing in court. Hence, while the instrument is in itself a binding instrument, the person enforcing it has no rights, or not sufficient rights, for a court of justice to recognize. The reason for the failure in its enforcement is therefore not real, but personal.

Remote parties stand upon another footing. Their position is different from that of immediate parties. The elements which distinguish them in legal theory from immediate parties are consideration and notice. The principle of the law merchant is the ancient principle of equity that where, in the transfer of title, a person has acquired a title and paid a valuable consideration without any notice of an equity actually existing in favor of another, the former may by that means obtain a perfect title, and hold the property freed from the prior outstanding equity.<sup>1</sup> "One who purchases a legal title," says Professor Ames,<sup>2</sup> "for value and without notice, takes the title discharged of all equities to which it was subject in the hands of his vendor; \* \* \* for an equity, being in its nature a claim in personam, and not in rem, can be enforced only against a party to the transaction in which the equity arises, or some one in privity with that party. The transfer of bills and notes by virtue of their negotiability is governed by the same principle. A purchaser for value without notice, therefore, acquires a title free from \* \* \* the personal defenses." The application of this theory has a practical aspect of great value in the circulation of the instrument. Consider

<sup>1</sup> Pom. Eq. Jur. § 591; *Le Neve v. Le Neve*, 2 Amb. 436, 2 Lead. Cas. Eq. (4th Amer. Ed.) 109.

<sup>2</sup> Ames, Bills & N. p. 836.



for a moment the immense difficulty sometimes attendant upon procuring evidence in cases of ordinary contract. It would be difficult and sometime impossible for a remote indorsee to disprove an alleged fraud between, say, the maker and the first indorser. If now he is a bona fide holder, by the application of this principle this is unnecessary. No evidence can be given of it. These defenses are ruled out; the courts will not listen to them. For these reasons, partly theoretical and partly practical, the courts will not allow the personal defenses against the purchaser for value without notice.

### Usury.

133. **USURY**—Is taking or receiving, with corrupt intent, money, goods, or things in action as a rate of interest upon the loan or forbearance of any money, goods, or things in action, in a greater amount than is allowed by statutory law.

134. The holder of a bill or note, even if he be a purchaser for value without notice, cannot recover the amount of the instrument from persons who were parties to the instrument at its inception when the instrument was negotiated in its inception at a rate of discount greater than the legal rate of interest.

135. Where a holder acquires a bill or note by an indorsement at a rate of discount greater than the legal rate of interest, such indorsement is a sale by the indorser and a purchase by the indorsee, for which the indorsee may recover the full amount of the maker, acceptor, or other prior parties, and the amount paid for the bill of his prior indorser.

Usury is statutory merely, and consists in extorting or taking a rate of interest beyond what is allowed by law. There are three things necessary to make a contract usurious: (1) The subject of the contract must be a loan; (2) more than lawful interest must have been received or must be taken; (3) it must be the effect of a corrupt agreement. Usury is what in law is called "malum prohibitum," not "malum in se." By this is meant that it is not something in itself intrinsically wrong. It is what the general public have in the past deemed unwise to be permitted by men in their business affairs. Because of this, the operation of usury laws is confined in every possible way. Thus, there must be proof of a lending and borrowing to constitute usury;<sup>3</sup> and, to make a contract for a loan usurious there must exist the intention knowingly to commit usury. This intent of the parties, when the contract is not upon its face usurious, is to be gathered from such circumstances as the situation and object of the parties at the time of the loan, the character and use to be made of the funds or article transferred, and the time and manner and place of payment. Designedly taking and receiving interest greater than the legal rate, although there be no corrupt agreement other than that which is manifested by one party allowing and the other receiving interest, is sufficient evidence of intent. In fact, this is generally the way in which the corrupt agreement is shown.

What constitutes a loan may be more clearly seen by showing some of the ways in which the courts have limited the usury laws. It is a well-settled rule that the loan must be of money.<sup>4</sup> An agreement, for example, whereby

<sup>3</sup>Price v. Campbell, 2 Call, 110.

<sup>4</sup>Dry Dock Bank v. American Life Ins. Co., 3 N. Y. 344; Bull v. Rice, 5 N. Y. 315.

the parties loan cattle, upon the understanding that during the loan the lessee is to pay a stipulated sum for the use of the property, with the further stipulation that the lease might terminate in sale, but, if the sale was not carried out, the cattle were to be returned, was not a usurious one. The case turned upon the principle that, where the agreement was for the loan of chattels, it was immaterial whether the compensation fixed by the agreement exceeded the statutory rate, because the subject of the loan, since it was not money, was not within the statute of usury. An agreement where<sup>5</sup> sheep were loaned, and, by the contract, the same number were to be returned, of the same age and quality, with interest of 15 to 25 per cent. upon their cash value, and another agreement where<sup>6</sup> a heifer was loaned at an interest of 25 per cent., to be returned in kind, were considered not usurious. These differ from money, in that money is supposed to have a fixed value. Chattels vary according as the market rises or falls. Therefore a loan of animals to be returned in animals is not usury, usury being confined to money only. The courts construe this out of the term of the statute, "the rate of interest." They take the ground that interest and forbearance cannot be predicated of any other than a loan of money, actual or presumed, because money has the same value when the loan is made and when returned; whereas chattels, measured by the standard of money, so fluctuate that taking the chattels borrowed and returned with the compensation for the use of the same at the time of returning the borrowed property may or may not aggregate in money value the value of the property loaned in the first instance. In the case of negotiable instruments, where an accommoda-

<sup>5</sup> Hall v. Haggart, 17 Wend. 280.

<sup>6</sup> Cummings v. Williams, 4 Wend. 680.

tion party makes, accepts, or indorses an instrument, and receives a commission for so doing, deducted from the avails of the note itself, there is no usury. The statute forbids an illegal rate of interest upon the loan or forbearance of money. This is a loan of credit, and not of money, credit being a distinct property from money. So bankers and merchants may, in addition to lawful interest on the discount of bills and notes, take a reasonable commission by way of compensation for trouble and expense, provided such commission be not intended as a device to cover a usurious loan. In all of these things, the moneys paid or deducted were for some other reason than the mere loan of money itself. Something was done in addition to handing over the money, and that something was paid for. Such payment was not interest, but rent or compensation.<sup>7</sup>

Another thing to mention is the common practice indorsed in *Marvine v. Hymers*,<sup>8</sup> by which a note is discounted in advance upon its face value. The lender here has the use of his own discount, and this, in case of discount of paper in large amounts, aggregates sometimes very large sums of money. This is, in fact, usurious, but, time out of mind, it has been the custom, and is allowed for the benefit of trade. It is confined in its operation to negotiable instruments, because they are of importance in commercial affairs, and banks play so important a part in discounting them that on all hands it is deemed necessary for the circulation of the instrument in the course of trade. Again, compound interest is not usury.<sup>9</sup> There is this distinction, however: An agreement for compounding future interest is illegal, not because such agreements are obnoxious to the usury

<sup>7</sup> *Ketchum v. Barber*, 4 Hill, 225.

<sup>8</sup> *Marvine v. Hymers*, 12 N. Y. 223.

<sup>9</sup> *Stewart v. Petree*, 55 N. Y. 621; *Guernsey v. Rexford*, 63 N. Y. 631.



laws, but because they may serve as a temptation to negligence on the part of the creditor and a snare to the debtor, and prove in the end oppressive and ruinous.<sup>10</sup> But where the interest has already accrued, then the parties may lawfully agree to turn such interest into principal, and to carry the interest in futuro, and the forbearance will constitute a consideration; the agreement to forbear for a time in the future being that which gives vitality to the promise. As a matter of fact, there is no new loan, and the interest is in excess of the legal rate. But the law implies a loan, and, an agreement being made, it declares the contract free from the taint of usury.

But, usury being once present, the next question is, how far does the statute operate in avoidance of contracts. The general rule is that, as between immediate parties in respect to all persons seeking enforcement of the contract, it is void. The taint of usury in the original contract is carried forward and enters into all subsequent contracts taken in renewal of it. And if it appears that a contract in the first instance is void, and is sought to be renewed by changing its form, so that the contract still stands upon the original loan, then the loan given in renewal is also void. This general rule is also very much confined, the exceptions being probably more numerous than the application of the rule itself. A mortgage, for instance, may be void for usury, but a bona fide purchaser of the property under its foreclosure acquires good title. A party is estopped from setting up usury where, by his representations, he has persuaded an innocent party to discount a negotiable instrument. Contracts voidable for usury may be ratified and become valid contracts. And also, where a renewal note is

<sup>10</sup> Quackenbush v. Leonard, 9 Paige, 334; Young v. Hill, 67 N. Y. 162.

void for usury, the parties may sue upon the original consideration.<sup>11</sup> And, lastly, the most important of these exceptions is the one that usury is a defense which can only be availed of by parties to the contract, or those connected in interest with them. A mere stranger, or one who has no legal interest in the question, may not take advantage of the statute, because the intent of the statute was to relieve oppressed debtors. They alone may claim its protection, and declare the contract, usurious in its inception, void.<sup>12</sup>

It only remains to apply the theories of usury to the doctrine of bills and notes. The more common situations to which the rules of usury have been applied are these: (1) A contract usurious in its inception in suit by the holder; (2) a contract valid in its inception, but tainted with usury in a subsequent indorsement or transfer of it; (3) where one indorser seeks to avail himself of it as a defense where either the note had a usurious inception, or prior indorsements have been corrupted by usury.

The inception of the note, so far as it relates to usury, is not its delivery. In such cases the question is whether the person discounting the instrument, and taking greater than the legal rate of interest, takes it from a person who at the time of such discount could have maintained an action upon it against prior parties to the instrument itself; for, if the person who discounted the note and who received the money upon its discount could not have maintained an action against prior parties, then these prior parties must be deemed accommodation parties, and the note is

<sup>11</sup> *Farmers' & Mechanics' Bank of Genesee v. Joslyn*, 37 N. Y. 353; *Winsted Bank v. Webb*, 39 N. Y. 325.

<sup>12</sup> *Note to Mason v. Lord*, 40 N. Y. 490, classifies the authorities and shows who as parties may and who may not raise the defense of usury.

given life by its discount with the party who deducts greater than the legal rate of interest.

When the paper is usurious in its inception, then it is void as to the maker, acceptor, and parties prior to the discount, and no subsequent transaction can make it valid. Void in its inception, it continues void forever, whatever its subsequent history may be. It is as void in the hands of an innocent holder for value as it was in the hands of those who made the usurious contract. No vitality can be given it by sale or exchange, because that which the statute has declared void cannot be made valid by passing through the channels of trade.<sup>13</sup>

Where the instrument is not usurious in its inception, but is valid as between the drawer or maker and the payee, so that the latter can maintain an action upon it against the former, then the bill or note may be sold at a discount by allowing the purchaser to pay less for it than it would amount to at the legal rate of interest for the time the bill has to run. This is because, if the bill was free from usury as to immediate parties to it, no after transaction with another person can, as respects those parties, invalidate it; so that the face of the bill may be recovered by the indorsee from prior parties to a valid bill, untainted with usury in its inception. As to immediate parties between whom less than the face of the bill has been paid, the relation is somewhat different. The instrument is treated like any other chattel, the discount being the purchase price. If the prior party is sued, then he may show, as between the immediate parties to the contract, just what he received for the note which he sold. But all other parties

<sup>13</sup> *Clafin v. Boorum*, 25 N. E. Rep. 360, s. c. 122 N. Y. 385; *Powell v. Waters*, 8 Cow. 669; *Wilkie v. Roosevelt*, 3 Johns. Cas. 206; *Bennett v. Smith*, 15 Johns. 335-357; *Miller v. Hull*, 4 Denio, 104, 107; *Miller v. Zeimer*, 18 N. E. Rep. 716, s. c. 111 N. Y. 441-444.

may not avail themselves of this reduction, because they, by virtue of their indorsement, indemnify for the face of the instrument itself. They stand in the relation of indorsers, whereas the immediate party, who has received less than the face of the bill, stands in the position of a person selling only an ordinary chattel.<sup>14</sup>

The third of the positions is, when one indorsee receives the note from an indorser, which is void as against the maker or prior parties for usury, he may recover from his indorser the amount paid upon the indorsement. This is because the indorsement amounted to a new and independent contract between the indorser and indorsee, and as to them the usury, which was a defense to the acceptor or maker, was no defense. In other words, the indorser warranted the contract for its face value, and was estopped from setting up the defense of usury; so that suit upon the theory of implied warranty and recovery might be had for the amount or consideration which he paid his immediate indorser.<sup>15</sup>

While we have endeavored to formulate in a concise way the most logical theories concerning the transfer of negotiable instruments, the student is particularly cautioned that there is great confusion in the adjudged cases in the different states of the Union. This is particularly true in cases involving indorsements affected by usury. As a matter of theory, the position taken by the text writers Daniel and Parsons seems the most logical and most to be commended. It is that an indorsee discounting paper for more than the legal rate allowed may hold all parties liable for its face. The reason for this is that the statutes against usury must be strictly construed. They interdict

<sup>14</sup> *Munn v. Commission Co.*, 15 Johns. 44, 55, 56; *Powell v. Waters* 8 Cow. 669, 685-687; *Cram v. Hendricks*, 7 Wend. 569.

<sup>15</sup> *McKnight v. Wheeler*, 6 Hill, 492.



excessive interest for the loan of money. An indorsement is not a loan of money. The indorser does not cash his own promise to pay money. He cashes such a promise made by some one else with a guaranty or promise of indemnity of his own superadded. It is no more a usurious transaction than it would be for them to sell a piece of land with a warranty on their part that it was what it pretended to be. Such a contract is not a loan, and not within the strict construction of the statute of usury.

### Alteration of Instrument.

136. **ALTERATION**—Is changing in any respect the terms of a negotiable instrument by a party thereto without the assent of all other parties.

137. A material alteration avoids the instrument, because, as altered, it no longer represents the agreement among the parties.

138. An alteration made with the consent of the parties does not avoid the instrument.

139. An alteration which does not change the intention of the parties nor the tenor of the instrument does not avoid the instrument.

The reason that a material alteration of a negotiable instrument discharges a party who does not consent thereto is that it destroys the identity of the contract, and substitutes an agreement different from that into which he entered.<sup>16</sup> It is immaterial whether the intent with which

<sup>16</sup> Wood v. Steele, 6 Wall. 80; Angle v. Insurance Co., 92 U. S. 330; Mersman v. Werges, 5 Sup. Ct. Rep. 65, s. c. 112 U. S. 139.

the alteration was made was fraudulent or not.<sup>17</sup> And, though the doctrine of<sup>18</sup> the leading case on the subject shows that the reason which influenced the court of king's bench was that they considered an alteration in itself fraudulent, the present and probably wiser reason is that the party never assented to the liability called for in the altered instrument, and therefore the courts will not enforce it against him. In England this theory is carried in the early cases to extreme limits. The leading cases<sup>19</sup> maintain that even though the alteration be made by a stranger, and the parties to a contract be innocent of it, nevertheless the contract is void, and will not be enforced. But an examination of these early authorities shows that they originated in and depended upon subtle, and it must be added foolish, distinctions and theories of pleading, and there is certainly no reason except that of *stare decisis* why it should now be the law. In America, certainly, an early departure from this doctrine was taken.<sup>20</sup> An alteration by a stranger was regarded as a mere spoliation. The burden of proof to show that the alteration was not made by the party seeking to recover, or by those under whom he claimed, nor with his or their privity or consent, was cast upon the party seeking to recover. Upon this being shown, the contents of

<sup>17</sup> *Heath v. Blake*, 5 S. E. Rep. 842, s. c. 28 S. C. 406. See, contra, *Van Brunt v. Eoff*, 35 Barb. 501.

<sup>18</sup> *Master v. Miller*, 4 Term R. 320, 2 H. Bl. 140.

<sup>19</sup> *Davidson v. Cooper*, 11 Mees. & W. 795, 13 Mees. & W. 343; *Pattinson v. Luckley*, L. R. 10 Exch. 330, 44 Law J. Exch. 180; *Pigot's Case*, 11 Coke, 27.

<sup>20</sup> *Rees v. Overbaugh*, 6 Cow. 746; *Lewis v. Payn*, 8 Cow. 71; *Nichols v. Johnson*, 10 Conn. 192; *Wickes v. Caulk*, 5 Har. & J. 36; *Den. v. Wright*, 7 N. J. Law, (2 Halst.) 176; *Waring v. Smyth*, 2 Barb. Ch. 119.

the original instrument, if they could be ascertained, were enforced. The instrument was not declared void.

This is in accord with the fundamental principles of contract. Equally so are those which hold that an alteration which was made with the knowledge or consent of the parties, or which does not change the effect or tenor of the instrument, do not affect the validity. Where the parties know and assent to the change, and derive any benefit from it, it is a new contract upon a new consideration, and therefore in itself valid. Where there is no benefit derived from either party by the change, and yet they have knowledge of and assent to the change, each party makes the person making the change his agent, and ratifies his act, so that it is binding upon him.<sup>21</sup> Where the legal effect of the instrument is not changed by an alteration, the alteration is immaterial. The liability sought to be enforced against the party is the one which he in the first place assumed. The fact that the verbiage or appearance of the instrument is changed is unimportant. The courts look to the obligation, and, if that be unaltered in effect, then there is no reason why it should not be enforced. This is a question of construction and for application of law by the court. The courts will not allow justice to be obstructed, for the light reason that the form of the agreement is altered when its substance remains.

<sup>21</sup> *National State Bank v. Rising*, 4 Hun, 793; *Commercial Bank of Buffalo v. Warren*, 15 N. Y. 577; *Greenfield Bank v. Crafts*, 4 Allen, 447; *Huntington v. Ballou*, 2 Lans. 120.

### Material Alterations.

#### 140. Alterations are material:

- (a) Which change the effect of the instrument, and place an additional burden on one of the parties. Such are changes in the date, time, place, amount, or medium of payment and the rate of interest.
- (b) Which change the liabilities and obligations of all or any of the parties. Such are the addition or removal of the signature of a maker, drawer, indorser, payee, or co-surety.
- (c) Which change the operation of the instrument, or its effect in evidence. Such are adding words of negotiability or of a special consideration after value received, or changing the form of the indorsement, or changing the liability from joint to several, or from joint to joint and several, as the case may be.

The absence of a date upon a negotiable instrument at its inception, or the fact that it is postdated or antedated, may not be material upon the question of its validity. But when a date has once been inserted, and its time of payment has thus been fixed, such date is material, and cannot be altered without the consent of the maker.<sup>22</sup> The reason

<sup>22</sup>Stephens v. Graham, 7 Serg. & R. 505; Walton v. Hastings, 4 Camp. 223; Jacobs v. Hart, 2 Starkie, 45; Outhwaite v. Luntley, 4 Camp. 179; Master v. Miller, 4 Term R. 320; Britton v. Dierker, 46 Mo. 592; Owings v. Arnot, 33 Mo. 406; Crawford v. West Side Bank, 2 N. E. Rep. 881, s. c. 100 N. Y. 50.



for this is, in the words of Justice Swayne,<sup>23</sup> that "the agreement is no longer the one into which the maker entered. Its identity is changed. Another is substituted. There is no longer the necessary concurrence of minds. The maker may well plead that he did not so promise. To prevent and punish such tampering, the law does not permit the holder to fall back upon the contract as it was originally. In pursuance of a stern, but wise, policy, it annuls the instrument as to the party sought to be wronged." The date is obviously a material part of the order or promise. It indicates the time of its inception. It shows the time of its performance; and its alteration places an unjust burden upon the wronged party, and a liability which the law will not enforce. For much the same reason, an alteration in a note or bill which changes the time of its payment is material, and discharges those parties to it who did not authorize the change.<sup>24</sup> This is true whether the payment is hastened or delayed. It is no argument that such acceleration or delay may be a benefit to the acceptor, maker, or indorsers, in any particular case; for, if this tampering with instruments were permitted in general, there would be no certain time for the acceptor or maker to have his funds at a given place, nor for the indorsers to be on the alert to see that the payment was paid, and to protect themselves if it were not. A change in the instrument in respect to its time of payment would place the burden of constant inquiry upon the parties liable for its

<sup>23</sup> Wood v. Steele, 6 Wall. 80.

<sup>24</sup> Lee v. Murdoch, 4 Pat. App. 261; Long v. Moore, 3 Esp. 155, note; Alderson v. Langdale, 3 Barn. & Adol. 660; Miller v. Gilleland, 19 Pa. St. 119; Lewis v. Kramer, 3 Md. 265; Bathe v. Taylor, 15 East, 412; Benedict v. Miner, 58 Ill. 19; Lisle v. Rogers, 18 B. Mon. 528.

payment. This reasoning applies where the place of payment is obliterated, or where a place of payment is inserted in a blank space, or where the place of payment is otherwise altered. Properly enough, the law does not permit even a bona fide holder to recover upon a bill or note so altered against the parties prior to the one making the alteration.<sup>25</sup> The place, as well as the time, of payment, are essential and material parts of the contract entered into; for on their proximity or remoteness must depend, in point of time, the indorser's knowledge of non-payment, which in most cases must be to him a matter of great importance. He cannot be charged with liability unless payment of the instrument is demanded at the time when and the place where it is due; and, when this is changed without the indorser's consent, he is subjected to new and unexpected liabilities, and in fact a new contract is made for him, to which he is not a party.<sup>26</sup>

The amount to be paid by the instrument cannot be changed, either by lessening or increasing it, without destroying the contract. Under this rule there can be no lessening or increasing the amount of principal;<sup>27</sup> nor by adding words varying the interest to be paid on a bill or note, either by changing the per cent. or adding interest

<sup>25</sup> *Cowie v. Halsall*, 4 Barn. & Ald. 197, 3 Starkie, 36; *Rex v. Treble*, 2 Taunt. 328; *Tidmarsh v. Grover*, 1 Maule & S. 735; *Nazro v. Fuller*, 24 Wend. 374; *Sudler v. Collins*, 2 Houst. 538; *Burchfield v. Moore*, 25 Eng. Law & Eq. 123; *Morehead v. Parkersburg Nat. Bank*, 5 W. Va. 74; *Macintosh v. Haydon*, Ryan & M. 362; *Hill v. Cooley*, 46 Pa. St. 259; *White v. Haas*, 32 Ala. 430; *Oakey v. Wilcox*, 3 How. (Miss.) 330.

<sup>26</sup> *Woodworth v. Bank of America*, 19 Johns. 391; *Wolcott v. Santvoord*, 17 Johns. 248; *Nazro v. Fuller*, 24 Wend. 374.

<sup>27</sup> *Goodman v. Eastman*, 4 N. H. 455; *Bank of Commerce v. Union Bank*, 3 N. Y. 230; *Stephens v. Graham*, 7 Serg. & R. 505.

where the bill or note did not before provide for any;<sup>28</sup> nor by altering the currency in which payment is to be made, or, if the bill or note is payable in merchandise, modifying the character or quality of the goods.<sup>29</sup> The reason for these rules is that, if the amount to be paid is increased in value, the alteration of the instrument is a forgery. If to a less amount, the identity of the contract is destroyed. If interest is added, it adds to the burden borne by the parties; if diminished, the effect of the contract is changed; and, since there might be cases where injury would be wrought, the policy of the law will not permit such change. The test to be applied is, were the words added or stricken out mere surplusage, or were they material to the obligation assumed by the parties to the contract? What was the evident intent of the parties, and was the change in furtherance of that intention? Were the legal damages contemplated by the parties the same as those to be awarded by the contract in its changed condition?<sup>30</sup>

The doctrine of the so-called *Pigott's Case*, which is the source of the doctrine of alteration, has been extended to every situation where instruments are presented or sought to be used as evidence for the enforcement of an unexecuted obligation or contract. If there is added or withdrawn

<sup>28</sup> *Boalt v. Brown*, 13 Ohio, (N. S.) 364; *Waterman v. Vose*, 43 Me. 504; *Lee v. Starbird*, 55 Me. 491; *Neff v. Horner*, 63 Pa. St. 327; *Dewey v. Reed*, 40 Barb. 16; *Brown v. Jones*, 3 Port. 420; *Whitmer v. Frye*, 10 Mo. 348; *Fay v. Smith*, 1 Allen, 477; *Patterson v. McNeeley*, 16 Ohio St. 348; *McGrath v. Clark*, 56 N. Y. 36; *Ivory v. Michael*, 33 Mo. 398; *Warrington v. Early*, 2 El. & Bl. 763; *Sutton v. Toomer*, 7 Barn. & C. 416.

<sup>29</sup> *Darwin v. Rippey*, 63 N. C. 318; *State v. Cilley*, quoted in 1 N. H. 97; *Martendale v. Follett*, 1 N. H. 95; *Schwalm v. McIntyre*, 17 Wis. 232.

<sup>30</sup> *Church v. Howard*, 17 Hun, 5.



another maker or drawer, or if a person signs or withdraws his name as a surety to a note or bill after it is executed, such addition or withdrawal creates a new contract. Hence such change is a material alteration.<sup>31</sup> It is not to the point that the alteration be or be not to the prejudice of the party against whom the liability is sought to be enforced. The courts will not compel the execution of a contract which the parties have never made. They will not sit in judgment upon the question whether it be to the prejudice of the party aggrieved or not.<sup>32</sup> This is also true where the operation or effect of the instrument is changed, and it operates differently from the original instrument. If, for example, a promissory note, negotiable, and for the payment of a sum of money absolutely on its face, is modified and loses its negotiability, so that it is converted into a special contract, the alteration is material, and avoids the instrument.<sup>33</sup> Where there are memoranda upon the instrument which qualify it, and are intended as a substantive part of it, and these are changed, the alteration is material.<sup>34</sup> So, also, ingrafting upon a joint note a several obligation, or changing a joint and several to a joint note, destroys the operation of the original contract, and renders it void.

It is perhaps proper to add to the foregoing rules a statement of the way they are limited in their operation. The rules, briefly stated, are as follows:

<sup>31</sup> *Clark v. Blackstock*, Holt, N. P. 474; *Ex parte White*, 2 Deac. & C. 334; *Bank of Limestone v. Penick*, 5 T. B. Mon. 25; *Pulliam v. Withers*, 8 Dana, 98; *Gardner v. Walsh*, 32 Eng. Law & Eq. 162.

<sup>32</sup> *Chappell v. Spencer*, 23 Barb. 584.

<sup>33</sup> *Hartley v. Wilkinson*, 4 Maule & S. 25; *Cholmeley v. Darley*, 14 Mees. & W. 343; *Leeds v. Lancashire*, 2 Camp. 205.

<sup>34</sup> *Benedict v. Cowden*, 49 N. Y. 396; *Johnson v. Heagan*, 23 Me. 329; *Burchfield v. Moore*, 3 El. & Bl. 683; *Simpson v. Stackhouse*, 9 Pa. St. (9 Barr.) 186; *Wheelock v. Freeman*, 13 Pick. 165.



(1) Where the party complaining of the alteration has by his negligent conduct made the alteration possible, so that the alteration can be so made either by alteration or erasure as not to excite the suspicion of a careful man, the aggrieved party will be liable upon it to a bona fide holder. This is because a maker, by putting his paper in circulation, has invited the public to receive it if any one has it in possession with apparent title to it. And he is estopped to urge the actual defect of title against a bona fide holder.<sup>35</sup>

(2) Where a bill or note is given for a valuable consideration, existing independently of the instrument, an alteration of the note or bill in a material part by the holder without authority of the maker prevents recovery upon the note or bill, whether the alteration be made with or without fraudulent intent.<sup>36</sup> When the material alteration is made by the holder of a written security or evidence of debt with intent to defraud his debtor, there can be no recovery upon the original consideration. Where the party receiving the instrument is innocent of the fraud, he may recover upon the original consideration.<sup>37</sup>

### Fraud.

**141. FRAUD—**Means deception practiced to procure the issue or subsequent negotiation of a negotiable bill or note by a party thereto, or its negotiation in breach of faith, or in fraud of the rights of third parties.

<sup>35</sup> Van Duzer v. Howe, 21 N. Y. 531.

<sup>36</sup> Alderson v. Langdale, 3 Barn. & Adol. 660.

<sup>37</sup> Meyer v. Huncke, 55 N. Y. 412; Atkinson v. Hawdon, 2 Adol. & E. 628.

Fraud and duress each destroy the effect of a contract as a legal obligation, because, with one party at least, in a contract which has its inception or negotiation in fraud or under duress, there is no full assent. The contract, therefore, is not a true evidence of the intent of the parties.

Fraud is very hard and perhaps impossible to classify or define accurately. The proposed New York Civil Code classifies and defines it thus:<sup>38</sup> "Actual fraud consists in any of the following acts committed by a party to the contract, or with his connivance, with intent to deceive another party thereto, or to induce him to enter into the contract. Its elements are (1) the suggestion as a fact of that which is not true by one who does not believe it to be true; (2) the positive assertion in a manner not warranted by the information of the person making it of that which is not true, though he believes it to be true; (3) the suppression of that which is true by one having knowledge or belief of the fact; (4) a promise made without any intention of performing it; (5) any other act fitted to deceive. Constructive fraud consists (1) in any breach of duty which, without an actually fraudulent intent, gives an advantage to the person in fault, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him; (2) in any such act or omission as the law specially declares to be fraudulent, without respect to actual fraud." Professor Pomeroy, in his comprehensive way,<sup>39</sup> says of fraud that it includes "all willful or intentional acts, omissions, and concealments which involve a breach of either legal or equitable duty, trust, or confidence, and are injurious to another, or by which an undue or unconscientious advantage over another is obtained." After read-

<sup>38</sup> Civil Code N. Y. §§ 757, 758.

<sup>39</sup> Pom. Eq. Jur. § 873.

ing these definitions, which were constructed by learned men, it may occur to the mind of the student that the subject is left in as much darkness as before. And, in truth, to the mind of the practitioner, as well as of the student, the subject of fraud looms up vague and indistinct. Some of its commoner elements are, however, (1) a loss to one person through the act or contract of another; (2) some false act, statement, or conduct of that other, or the active suppression of some material matter made with reference to the inception of the contract; (3) an undue advantage of the other gained by or through his deception. The question to be asked and the test to be applied is whether the party against whom the contract is sought to be enforced fully understood the nature of the liability on his part to be incurred and freely assented to it. And, if he did not, whether this misunderstanding was due to the positive acts of the other party to the contract. These two elements concurring in a given case, the courts will not enforce a contract in favor of a party through whose wrong the contract was entered into.

In case of negotiable instruments, fraud is a personal defense, and only good as between immediate parties. For with negotiable instruments, as with most other property, the equitable rule prevails that if a third person, not knowing of the fraud, and not being put upon his inquiry, buys the instrument for an adequate valuable consideration from one who has obtained it through fraud, this defeasible title will be made indefeasible, and he may hold and enforce the instrument. As between the original party and the second purchaser, both of whom are innocent, the law will cast the loss on him whose laches enabled the defrauder to transmit them to one not negligent.<sup>40</sup> Another

<sup>40</sup>Southwick v. First Nat. Bank of Memphis, 84 N. Y. 420; Gridley v. Bane, 57 Ill. 529; Ormsbee v. Howe, 54 Vt. 182.

technical reason arises out of relief granted in cases of fraud. The party wronged by a fraud in case of a contract may at his election affirm it, and take from it what benefit he can; or he may rescind it, and treat the contract as though it had never been made. The operation of this rule presupposes that the contract was in its inception a binding obligation, and, in case of its affirmation, that it continues so. As the law phrases it, the contract affected by fraud is voidable, but not void. Manifestly, this right of rescission should not be extended in its operation against the bona fide holder. If it is to be exercised, it should be only exercised as long as the parties stood in their original relation, and before the rights of third parties intervened. If the party who had the right of rescission failed to assent, it was laches on his part, for which the innocent purchaser for value should not suffer.

### Duress.

**142. DURESS**—Méans the procurement or negotiation of the instrument by compulsion. It may be either of the person or property of the party.

Duress consists in actual or threatened violence or imprisonment. The subject of it must be the contracting party himself, or his wife, parent, or child; and it must be inflicted or threatened by the other party to the contract, or else by one acting with his knowledge and for his advantage.<sup>41</sup> Probably, duress is also a personal defense, though upon this point the decisions are at variance. It is maintained by some authorities in reference to the transfer of property in general that a bona fide purchaser for

<sup>41</sup> Anson, Cont. p. 164.



value does not acquire a good title to a chose in action which he has bought from one who has procured it from the owner by undue influence, compulsion, and coercion. They distinguish it from that class of cases which hold that where the owner of property, induced by false representations, parts with the possession of it with the intention of passing the title to the vendee, in that, in such cases, the bona fide purchaser for value from the fraudulent vendee obtains a title which he can defend. In these latter cases there was a voluntary parting with the possession of the property, and there is an uncontrolled volition to pass the title. But where there exist coercion, threats, compulsion, and undue influence, there is no volition. There is no intention nor purpose but to yield to moral pressure for relief from it. A case is presented more analogous to a parting with property by robbery. No title is made through a possession thus acquired.<sup>42</sup> There is also a class of English cases which declares, in effect, that duress or fraud renders the paper absolutely void in all hands, even of the bona fide holder. The soundness of this law is extremely doubtful, though it rests on the decision of a famous judge. Judge Byles, in delivering the decision in a case<sup>43</sup> where a very old man was induced to indorse a bill under the belief that it was a guaranty, and never intended to sign the bill, held that this was such a fraud as vitiated the contract, even in the hands of a bona fide holder. In

<sup>42</sup> *Barry v. Equitable Life Assur. Soc.*, 59 N. Y. 587; *Loomis v. Ruck*, 56 N. Y. 462; *Huguenin v. Baseley*, 14 Ves. 273, 3 Lead. Cas. Eq. 94, 463; *Eadie v. Slimmon*, 26 N. Y. 9; *Gardner v. Gardner*, 34 N. Y. 155; *Voorhees v. Voorhees*, 39 N. Y. 463; *Tyler v. Gardiner*, 35 N. Y. 559; *Kinne v. Johnson*, 60 Barb. 69; *Ferris v. Brush*, 1 Edw. Ch. 572; *Fry v. Fry*, 7 Paige, 461.

<sup>43</sup> *Foster v. Mackinnon*, (1869,) L. R. 4 C. P. 704.

criticism of these authorities so far as they relate to negotiable paper, it may be said of the former class that they rest upon two lines of decisions, of which *Loomis v. Ruck* and *Barry v. Equitable Life Assur. Soc.* are prominent examples. In *Loomis v. Ruck* the signature of a married woman was given under duress to a note for the sole benefit of her husband to the plaintiff, who, at the time of the duress, was present. It is true that the statement of the court of appeals was that a bona fide holder cannot enforce a note against the maker which was given by him under duress, but this statement is, in fact, obiter dictum, because the plaintiff in the case was not a bona fide holder. The case of *Barry v. Life Assur. Soc.* does not affect this position, because that relates to the assignment of a life insurance policy, which is a mere chose in action, to which the doctrines of negotiability do not attach. And in regard to the decision of Judge Byles, it is submitted with all deference that this instrument, if void at all, was void because there was no contracting mind and no delivery, and hence no more inception to the contract than if a signature had been left in the first instance on a blank sheet of paper. It is certainly sounder business policy to protect the bona fide holder, to deem the instrument given under duress voidable, rather than void, to hold the party exercising the duress bound to give the other party his election whether to abide by the contract or to repudiate it, and to charge him with diligence in case of rescission,<sup>44</sup> than to clog the circulation of paper by putting the purchaser to his inquiry, and by depriving a party who has suffered duress from the possible benefits to be derived from his contract. And the authorities sustaining the position that negotiable paper

<sup>44</sup> *Ormes v. Beadel*, 2 De Gex, F. & J. 533.

obtained by duress is good in the hands of a third person, who received it before maturity in good faith for value, seem based upon the better reason.<sup>45</sup>

### Consideration.

**143. As between immediate parties, consideration is presumed. Any consideration which will support a simple contract is sufficient to support a negotiable bill or note, or the transfer or indorsement thereof. This presumption of consideration may be rebutted.**

The common phrase is that, in the first instance, consideration is presumed. This means that if, between immediate parties, there is no issue as to the consideration, then the mere production of the instrument on the trial is sufficient. But where the issue between the parties is consideration, then the statement in the instrument of value received is in the nature of an admission against interest, and nothing more. The burden of proof of the existence of a consideration is on the plaintiff, and, in case of a conflict of evidence, it remains on him to satisfy the jury by preponderance of evidence. The fact that a consideration has been given is stated in the instrument, and that the instrument is in writing, does not exclude oral evidence concerning the consideration. And if the instrument was without consideration in fact, although it is stated on its face to have been given for a consideration, this may be shown by extrinsic testimony<sup>46</sup> when the issue is as to the consideration. It seems to have been the

<sup>45</sup> *Veach v. Thompson*, 15 Iowa, 380; *Clark v. Pease*, 41 N. H. 414; *Rogers v. Adams*, 66 Ala. 600.

<sup>46</sup> *Abb. Tr. Ev.* pp. 404, 405.

early doctrine that, in order to enable the defendant to put the plaintiff on proof of consideration, he must give the plaintiff notice. But it is the rule of practice at present that a notice to prove consideration is unnecessary, and it is not now given. At present the plaintiff makes out his *prima facie* case; the defendant then gives evidence in dispute of the consideration; whereupon the plaintiff calls his witnesses in rebuttal of this, to prove it.<sup>47</sup>

Any consideration which will support a simple contract is sufficient to support a negotiable bill or note, or the transfer or indorsement thereof. The courts have held a sufficient consideration to be a cross acceptance, or the forbearance of the debt of a third person, or the compromise of a disputed liability, or a promise to give up a bill thought to be invalid, or a debt barred by the statute of limitations, or a debt discharged in bankruptcy. The courts have held insufficient considerations to be a mere moral obligation, or a debt represented to be due, though not really due, or the giving up a void note, or a voluntary gift of money. It will be observed that the distinction between the cases above referred to rests upon whether the different considerations are of any actual value.

The usual definition is that a consideration is either some detriment to the plaintiff, actually sustained or to be incurred for the sake of the defendant, or at the instance of the defendant, or some benefit to the defendant received or promised to be conferred, moving from the plaintiff. It need not be adequate, though it must be of some value. As to the value, however, there is the distinction<sup>48</sup> made between a valuable consideration other than money and a money consideration. With a valuable consideration

<sup>47</sup> See Wood's notes to Byles, Bills & N. pp. 121, 122.

<sup>48</sup> *Sawyer v. McLouth*, 46 Barb. 350.



merely, the slightest consideration will support a promise to pay the largest amount to the full extent of the promise, while with a money consideration the consideration will support a promise to pay money only to the extent of the money forming the consideration. The law is deemed to leave the measure of the value of a valuable consideration other than money for a promise to pay money to the parties to the contract; but money, being the standard of value, is not subject to be changed by contract, and will support a promise to pay money only to the amount of the consideration.

Except, then, where money is paid for a bill or note, any other valuable thing will suffice as a reason for the enforcement of the instrument. In such cases as a voluntary gift of a note;<sup>49</sup> or its indorsement as a gift;<sup>50</sup> or where a plaintiff and defendant, as executors of an estate, exchanged notes with the intent of assuring payment against each other in an impending arbitration, and it was sought to construe these notes as promises which charge them personally;<sup>51</sup> or where two persons gave notes contingent upon the fact that, if they were paid in the future, the payee would convey to him certain lands, which in fact were never conveyed,—in all such cases, we say, there is no consideration for the promise. In them the promise is a nudum pactum. The courts will not compel parties to pay money to a party from whom they, in turn, had received nothing. Hence the entire want of consideration between immediate parties destroys all remedy upon the bill or note, because, as between immediate parties, the negotiable instrument is governed in this respect by the general rules of contract law.

<sup>49</sup> *Pearson v. Pearson*, 7 Johns. 26.

<sup>50</sup> *Schoonmaker v. Roosa*, 17 Johns. 301.

<sup>51</sup> *Winter v. Livingston*, 13 Johns. 54.

### Want or Failure of Consideration.

144. As between immediate parties, a partial want or failure of consideration is a defense pro tanto, but the part alleged to have failed must be clearly ascertained.

145. When there is a want of consideration between the original parties, or the consideration of the note, though good in the first instance, entirely fails, this is a defense between immediate parties.

Where the consideration of the note is valuable in the first instance, and then becomes valueless, there is a failure of consideration, and a defense between immediate parties. The doctrine of failure or want of consideration is, however, to be closely scrutinized to distinguish between failure of consideration and inadequacy of consideration; between whole and partial failure of consideration; and between definite and indefinite want or failure of consideration. While it cannot be said that these doctrines are fully settled by authority, the general doctrines of the cases classify the rules as follows:

(1) Total failure or want of consideration is a defense in an action between immediate parties.

(2) Mere inadequacy of consideration is no defense between immediate parties.

(3) In case of a pecuniary consideration or of property having a fixed pecuniary standard, it is a defense pro tanto.

(4) In case of partial failure of an unliquidated consideration, recoupment or counterclaim may be allowed.

(5) A want of a defined part of a consideration is a defense pro tanto.

In reference to the failure of consideration and its inadequacy, the rule<sup>52</sup> is that in the transfer of property, although the property transferred was not that contracted for, or was in some instances almost worthless, yet the mere fact that it was not of the value which it was supposed to be at the time of the making of the contract will not be a defense in an action for the purchase price. In case of sales, the vendee is not permitted to retain the goods and not pay the purchase price of them; and, though the consideration has in some respects failed, yet, as long as the vendee has retained the goods, he must pay the purchase price, being only permitted to recoup his damages for what he has suffered in diminution of the value of the property. In cases tainted with fraud, the vendee may return the property, and defeat an action for the price by rescinding or doing what amounts to rescinding the contract on this ground of fraud. But the law does not regard a diminution in the value of the consideration when it is executed. The consideration once passed, the promisor, receiving it, is bound to the performance of his contract, however inadequate this consideration may turn out to be.

It is maintained that a different rule applies in cases of executory consideration. The instance given by Chancellor Kent is of two parties contracting for the sale and purchase of a horse actually dead, but supposed to be alive at the time of the contract. In such an event the chancellor intimates the contract would fail.<sup>53</sup> But, if a close examination is made of the adjudged cases, it is found that the consideration fails or is wanting entirely. The question, therefore, is not one of inadequacy. Inadequacy of considera-

<sup>52</sup> *Burton v. Stewart*, 3 Wend. 236; *Day v. Pool*, 52 N. Y. 416; *Brigg v. Hilton*, 3 N. E. Rep. 51, s. c. 99 N. Y. 517; *Norton v. Dreyfuss*, 12 N. E. Rep. 428, s. c. 106 N. Y. 91.

<sup>53</sup> 2 Kent, Comm. 468.

tion is to be sharply contrasted with a consideration which has wholly or partially failed.<sup>54</sup> The rule is as to all considerations founded upon specific articles of property, which have not a specific, fixed, certain pecuniary value, that the court, upon the question of consideration, will not inquire into their actual pecuniary value, but will leave the parties to such estimates thereof as they have formed in making their contract. A party will not be allowed to interpose as a defense that the property was not pecuniarily worth that sum, or that he received no actual benefit from it. It is also undoubtedly the rule that where there is a failure or want of consideration, which can be liquidated and definitely ascertained by the court or jury, that, as the legal phrase runs, is a defense *pro tanto*. No recovery between immediate parties can be had for an amount greater than the consideration was actually valid. The reason for distinguishing this from an indefinite want or failure of consideration is wholly a technical one. It is that in the common-law courts the jury could not assess, by way of set-off, damages arising from a breach of contract, and the defendant was left to his cross action. In almost all jurisdictions this distinction is practically nullified by allowing the unliquidated claim as an affirmative defense or counterclaim.<sup>55</sup>

<sup>54</sup> *Worth v. Case*, 42 N. Y. 362; *Earl v. Peck*, 64 N. Y. 596; *Hamer v. Sidway*, 27 N. E. Rep. 256, s. c. 124 N. Y. 538.

<sup>55</sup> *Byles*, Bills, p. 133; *Daniels*, Neg. Inst. § 203; *Edw. Bills & N.* §§ 467, 469.



### Illegal Consideration.

146. As between immediate parties, any illegal consideration avoids a negotiable instrument in toto. But a separate contract, vitiated by an illegal consideration which is the consideration for the negotiable instrument, will not prevent its enforcement.

A brief statement of that broad topic of the general law of contracts known as "illegal consideration" is as follows:

Since every contract is but an agreement enforceable by law, to be enforceable it must be for some object which the law can recognize. The law refuses to recognize three general classes of subjects, and to enforce contracts made with reference to them. They are:

- (1) Those prohibited by statute, (illegal;)
- (2) Those prohibited by express rules of common law with reference to objects which the law deems evil or immoral, (immoral;)
- (3) Those which contravene public policy.

Illegal considerations are again of two kinds. The first kind is where an act or contract or consideration relates to some matter which a statute expressly forbids. An instance of this class would be a promissory note given in consideration of committing a murder,<sup>56</sup> an event highly improbable, but perhaps a clearer illustration on that account. The second class consists of those instances where special statutes undertake to regulate dealings between men and forbid them. Cases of consideration relating to gaming or wagers or contracts arising upon a consideration made

<sup>56</sup> Shep. Touch. 370.

in violation of the Sabbath are instances of this class. These two kinds of considerations, respectively, belong to and illustrate the class known as "*malum prohibitum*," (things which, if not forbidden by positive law, would not be immoral,) and "*malum in se*," (things which are so forbidden, because immoral.) In either case, as long as something is expressly prohibited by statute, the courts will not enforce it. But in the latter case the law will not undertake to relieve parties from the position in which they have placed themselves, or to adjust the equities between them; while in the former case, although the law will not enforce the prohibited consideration, it will take notice of the circumstances, and, if justice and equity require a restoration of money or property received by either party, it will give relief. If an action can be maintained on the transaction of which the prohibited transaction was a part, without sanctioning the illegality, such action will be maintained. Thus, if one suit be upon a note for money won, and another suit be upon a note for money lent in gaming, the statute is a bar to the suit for the money won, but not a bar to the one for money loaned.<sup>57</sup> And, to use another illustration,<sup>58</sup> illegal gaming is defined as "gain or loss between the parties by betting, such as would excite a spirit of cupidity;"<sup>59</sup> or it is defined as "an agreement between two or more that a sum of money, or some valuable thing, in contributing which all agree to take part, shall become the property of some one of them on the happening of some future event, which at present is uncertain." A note given for a bet will not be enforced in court because it comes within this definition and prohibition; but a purse or money

<sup>57</sup> *Robinson v. Bland*, 2 Burrows, 1077; *Pratt v. Short*, 79 N. Y. 437.

<sup>58</sup> *Harris v. White*, 81 N. Y. 532.

<sup>59</sup> *People v. Sargeant*, 8 Cow. 139.

put up as a prize is not a bet, and is recoverable. Money earned by driving race horses is not obnoxious to the statute, and may also be recovered. In other cases of prohibitions, a contract made on Sunday is not void at common law.<sup>60</sup> It is good unless it is in contravention of some express statute forbidding it. In most jurisdictions there are statutes regulating the Sabbath observance which are in harmony with the religion of the country and the religious sentiment of the public, and for the support and maintenance of public morals and good order. Acts which do not violate the purpose of this statute, and do not disturb and hinder those who for themselves desire to enjoy Sunday, are not prohibited.<sup>61</sup> Bargains made on Sunday are enforceable. Notes given on Sunday are good, unless they are for something prohibited by statute to be done, as for the enforcement of work done on Sunday exclusively.<sup>62</sup> Suffice it to say, the rules upon this point may be thus analyzed and summarized:

(1) No action lies for any consideration prohibited by law.

(2) A consideration for a collateral contract made in aid of one tainted by illegality cannot be recovered.

(3) A collateral contract made upon a consideration disconnected from the illegal transaction which was the basis of the first contract is not illegal, and may be enforced.<sup>63</sup>

Evil or immoral contracts and considerations are those which are made in breach of the well-settled rules of the common law. They are either agreements in consideration

<sup>60</sup> *Boynton v. Page*, 13 Wend. 425; *Story v. Elliot*, 8 Cow. 27; *Sayles v. Smith*, 12 Wend. 57.

<sup>61</sup> *Smith v. Wilcox*, 24 N. Y. 354.

<sup>62</sup> *Merritt v. Earle*, 31 Barb. 38; *Batsford v. Every*, 44 Barb. 620.

<sup>63</sup> *Armstrong v. Toler*, 11 Wheat. 258; *McBlair v. Gibbes*, 17 How. 232; *Benj. Sales*, pp. 521, 543.

of committing a civil wrong or of committing a crime prohibited by statute, or else agreements upon a consideration in fraud of the rights of third persons. Instances of the first kind are promises in consideration of committing a trespass likely to lead to a breach of the peace, or of printing a libel, or of committing a civil wrong by fraud or false pretenses. Such agreements are better known as "conspiracies;" and, wherever they are the consideration of a negotiable instrument, the court will refuse to enforce the instrument, as between immediate parties.<sup>64</sup> The agreements based upon a consideration in fraud of the rights of third persons most common in the courts are when one creditor takes a bill or note for some advantage to himself over other creditors, who have united with him in a composition of their debts against some common debtor.<sup>65</sup> In such a case each creditor acted on the faith that the engagement made with the others would be binding upon them, and each had the undertaking of the rest as a consideration for his own undertaking. The beneficial consideration to each creditor was the engagement of the rest to forbear. "Every composition deed," says Mr. Justice Duer,<sup>66</sup> "is in its spirit, if not in its terms, an agreement between the creditors themselves, as well as between them and the debtor. It is an agreement that each shall receive the sum of the security which the deed stipulates to be paid and given, and nothing more." A private agreement, evidenced by a bill or note, therefore, by any one creditor, to receive more than his composite share, is a fraud upon the rest, and the courts will not enforce it.<sup>67</sup>

<sup>64</sup> *Allen v. Rescous*, 2 Lev. 174.

<sup>65</sup> *White v. Kuntz*, 14 N. E. Rep. 423, s. c. 107 N. Y. 518.

<sup>66</sup> *Breck v. Cole*, 4 Sandf. 79-83.

<sup>67</sup> *Bliss v. Matteson*, 45 N. Y. 22.



Agreements which contravene public policy, so far as they are definitely classified, are either agreements based upon a consideration tending to injure the public service, such as agreements to use one's influence to secure an election or the appointment of a person to a public office, or to procure legislation; or agreements, based upon consideration, in obstruction of public justice, such as a note given for compounding a felony; or agreements based upon a consideration tending to encourage litigation, such as a bill or note originating in champerty or maintenance; or agreements in restraint of trade.

Comyn says: "All contracts or agreements which have for their object anything against the general policy of the common law are void."<sup>68</sup> This general principle is particularly applied to contracts which have for their object the perversion of the more ordinary operations of the government.<sup>69</sup> Every citizen owes to his government and all its officers, while executing their official duties, truth and fidelity. All the actions of the government and its officers are based upon certain facts assumed or proved, and falsehoods with reference to those facts are moral wrongs, injurious to the whole state whose government it is, and therefore against public policy. Thus, a note given for forbearing to make a bid on a government mail contract,<sup>70</sup> or a note given to procure the passage of a legislative act by sinister means, is void.<sup>71</sup> It is public policy for the courts to put the stamp of their disapprobation on every act, and pro-

<sup>68</sup> 1 Com. Cont. 301; Foul. Eq. bk. 1, c. 4, § 4.

<sup>69</sup> Gray v. Hook, 4 N. Y. 449.

<sup>70</sup> Gulick v. Ward, 10 N. J. Law, (5 Halst.) 87.

<sup>71</sup> Mills v. Mills, 40 N. Y. 543; Lyon v. Mitchell, 36 N. Y. 235; Fuller v. Dame, 18 Pick. 479; Sedgwick v. Stanton, 14 N. Y. 289; Frost v. Inhabitants of Belmont, 6 Allen, 159; Tool Co. v. Norris, 2 Wall. 45; Marshall v. Baltimore & O. R. Co., 16 How. 314.

nounce void every contract, the ultimate or probable tendency of which would be to sully the purity or mislead the judgments of those to whom the high trust of legislation is committed.

These, and reasons like them, are at the basis of the common-law rules based upon considerations touching the administration of public justice. Public justice may not be obstructed, nor, on the other hand, may it be stirred into unnatural life and vigor, by contracts which are in the nature of or amount to champerty or maintenance.<sup>72</sup> The public welfare requires that felonies should be investigated and punished, and it is the duty of a citizen paramount to all others to give every assistance to this end.<sup>73</sup> Every note given in pursuance of such an agreement as between immediate parties is void. In states where the ancient doctrines of champerty and maintenance still obtain, bills or notes originating in champerty or maintenance are void. In such jurisdictions the policy of the common law to confine litigation is strictly enforced. It must, however, be observed that the ancient doctrines of champerty and maintenance are much changed by statutes in the various states, and that, wherever these statutes have changed the law, the English common-law rules are also much modified.

The theory upon which agreements based upon a consideration in restraint of trade are held against public policy is that they deprive the public of the services of men in the spheres in which they are likely to be most useful, and expose the community to the evils of monopoly. This rule is much confined in its operation, for agreements based upon

<sup>72</sup> *Henderson v. Palmer*, 71 Ill. 579; *Roll v. Raguet*, 4 Ohio, 400, 418; *Gorham v. Keyes*, 137 Mass. 583; *Harris v. Brisco*, 17 Q. B. Div. 504.

<sup>73</sup> *Haynes v. Rudd*, 83 N. Y. 251. See, also, *Id.*, 7 N. E. Rep. 287, s. c. 102 N. Y. 372.

a consideration in partial restraint of trade are allowed, the distinguishing point being that the restriction must not go as to its extent in space beyond what is reasonable to protect the favored party, regard being had to the nature of the business and the interests of the public.<sup>74</sup> It is worthy of remark that the tendency of recent decisions is to relax the rigor of the doctrine that all contracts in restraint of trade are void. In England<sup>75</sup> it is denied that such has, in fact, ever been the law, and that such a rule is the true public policy is doubted. "If," said Sir George Jessel,<sup>76</sup> "there is one thing more than any other which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that contracts, when entered into freely and voluntarily, shall be held good, and shall be enforced by courts of justice. The theory that such contracts create monopolies is also to be questioned. Competition is not stifled. The business is open to all other persons. And it seems a sounder legal theory to say that a party may legally purchase the trade and business of another for the very purpose of preventing competition. The validity of the contract, if supported by a consideration, will depend upon the reasonableness between the parties."<sup>77</sup>

<sup>74</sup> *Mitchel v. Reynolds*, 1 P. Wms. 181. See cases chronologically arranged in 2 Pars. Cont. p. 748, note; *Nobles v. Bates*, 7 Cow. 307; *Chappel v. Brockway*, 21 Wend. 157; *Dunlop v. Gregory*, 10 N. Y. 241; *Alger v. Thacher*, 19 Pick. 51; *Arnot v. Pittston & E. Coal Co.*, 68 N. Y. 558.

<sup>75</sup> *Rousillon v. Rousillon*, 14 Ch. Div. 351.

<sup>76</sup> *Printing & Numerical Registering Co. v. Sampson*, 19 Eq. Cas. 462.

<sup>77</sup> *Whittaker v. Howe*, 3 Beav. 383; *Jones v. Lees*, 1 Hurl. & N. 189; *Leather Cloth Co. v. Lorisont*, 9 Eq. Cas. 345; *Collins v. Locke*, 4 App. Cas. 674; *Oregon Steam Nav. Co. v. Winsor*, 20 Wall. 64; *Morse Twist Drill & Mach. Co. v. Morse*, 103 Mass. 73; *Diamond Match Co. v. Roeber*, 13 N. E. Rep. 419, s. c. 106 N. Y. 473.



The foregoing is a classification of the common kind of illegal considerations between immediate parties. Whether the illegality goes to the whole consideration or only part thereof, it avoids the whole bill or note. This is not in contradiction of what has been before said with reference to contracts which were *malum in se* and those which were *malum prohibitum*. What is meant is that, if any part of a contract is void for illegality, all of it is void. The courts will not unravel and separate considerations which are good and considerations which are illegal and void, and allow recovery for those which are good. In this, illegal considerations which avoid the instrument differ from instruments which cannot be enforced because of partial lack or failure of consideration, the latter being, as has already been said, *good pro tanto*.

### **Lunacy or Drunkenness.**

**147. Lunacy or drunkenness is probably a defense to the enforcement of a bill or note between immediate parties. It is doubtful whether it is such a defense in the hands of a bona fide holder.**

It is probably the fact that the views of courts are changing with reference to executory contracts, such as bills or notes, upon which persons *non compos mentis* have incurred an obligation. And it is also probably true that in this they are departing from a position which was sustained by a consistent theory, but sustained at the expense of justice and common sense. The theory, as has been pointed out, was that such executory contracts would not be enforced by courts, because persons *non compos mentis* had no assenting mind, and therefore no capacity to contract. And while probably the majority of the decisions and very many



of the text writers do in truth declare this to be the rule, it is generally felt, whenever it is applied, that it is impracticable. The consensus of opinion in regard to executed contracts, at least, is that the contract of a lunatic or drunken person is voidable at his option, if it can be shown that at the time of making the contract he was absolutely incapable of understanding what he was doing, and the other party knew of his condition. In *Molton v. Camroux*<sup>78</sup> a lunatic purchased annuities of a society, paid the money, and died. His administratrix sued the society to recover back the money, on the ground that the contract was void. The jury found that at the time of the purchase the vendee was insane, and incompetent to manage his own affairs, but that there was nothing to indicate this to the company, and that the transaction was bona fide. Judge Patteson, in deciding the case, remarked that "when the state of mind was unknown to the other contracting party, and no advantage was taken of the lunatic, the defense cannot prevail, especially when the contract is not merely executory, but executed in whole or in part, and the parties cannot be restored to their original position." In regard to executory contracts, the departure of the courts from this ancient, established, but inexpedient, doctrine is more slow. They differ, too, in their treatment of the rules as yet applied to insane and to drunken persons. In regard to insane persons two doctrines are held. The first is that, insanity being shown by way of defense, the burden of proof is thrown upon the plaintiff to show that the defendant was competent to contract at the time the contract was made.<sup>79</sup> But even in this view the courts incline to look upon the doctrine rather upon its equitable side than as a sharply-defined

<sup>78</sup> *Molton v. Camroux*, 2 Exch. 489, 4 Exch. 17.

<sup>79</sup> *Hicks v. Marshall*, 8 Hun, 327.

legal proposition as to whether a bona fide holder might recover against an insane person upon his bill or note. By those most favoring the strict rule of the common law, it is admitted that the doctrine is implied that bona fide holders cannot recover upon the note unless they show that the consideration was such that it should be upheld in equity, and that persons of unsound mind are not necessarily wholly relieved from the obligations of contracts when they or their estates have been benefited. On the contrary, rather, it is admitted that they will be held liable and a valid claim against them, or their estates, will be created. The second is that a bona fide holder of a bill or note without notice of the lunacy, who takes the note in good faith, may recover, unless it be shown affirmatively against him that he imposed upon the defendant in some way. This is the doctrine of the English courts and of some of the courts of the United States. These cases declare that, in the absence of all proof on the subject, it is a reasonable presumption that no man should be suspected of lunacy by those who deal with him, and that, therefore, they have a right to call upon the defendant to show, not only the lunacy, but also the plaintiff's knowledge or suspicion of it, and the fraud, if any, practiced upon the defendant. "If the lunatic was not defrauded," say the courts, "he ought to pay."

The courts have arrived at rules regulating contracts of intoxicated persons by somewhat different steps. They were influenced by the question whether the drunkard was adjudged incompetent to manage his affairs or not, and, if not, then the question arose in what stage of drunkenness the contract was made. They have classified the rules in such cases as follows:

(1) That, when the drunkard is adjudged incompetent, no recovery in an action upon the bill or note can be had

by the bona fide holder, but he must resort to the committee of the lunatic.

(2) When so intoxicated that he is entirely bereft of his senses, the weight of authority is that no recovery can be had by the bona fide holder; and, if no recovery can be had by him, then he may recover upon the original consideration.

(3) That when slightly under the influence of liquor, a recovery can be had. Such a state can be used only to show fraud.

(4) The defense can only be made available by returning the consideration received by the person when intoxicated, as in the case of the ordinary rescission of a contract. The rule is well defined and settled that, after an adjudication by the court that a person is incompetent to manage his own affairs by reason of drunkenness, such person is not liable upon his note or indorsement, even when that is in the hands of a bona fide holder.<sup>80</sup>

The reason is that the holder and purchaser is bound to take notice of the public judicial act of taking a man's property out of his hands, and putting it in that of a committee, and that the creditor must seek his recourse against the committee, and not against the drunkard. Here, if the court is satisfied upon the whole that the claim is just, they will allow it.

In cases of bills and notes made in a state of intoxication by persons not habitual drunkards, there is a difference of opinion in different jurisdictions. There is also a difference in the rules themselves occasioned by the varying degrees of mental incapacity at different stages of intoxication. When it is complete, it is the doctrine of the

<sup>80</sup> *Wadsworth v. Sharpsteen*, 8 N. Y. 388; *L'Amoureux v. Crosby*, 2 Paige, 427; *Leonard v. Leonard*, 14 Pick. 283.

English courts that no recovery can be had, even in the hands of a bona fide holder. On the other hand, the courts of Pennsylvania consider such a note perfectly good in his hands.<sup>81</sup> The English courts are governed in their rulings by the somewhat artificial differences growing out of their former system of pleading. In those points it is held, with regard to contracts which it is sought to avoid on the ground of intoxication, that there is a distinction between "express" and "implied" contracts. When a right of action is grounded upon a specific distinct contract, requiring the assent of both parties, and one of them is incapable of assenting, in such a case there can be no binding contract; but in many cases the law does not require an actual agreement between the parties, but implies a contract from the circumstances. The law itself is deemed to make the contract for the parties. So a tradesman who supplies a drunken man with necessaries may recover the price of them, if the party keeps them when he becomes sober. With negotiable instruments, the defendant is still liable for the consideration for the note or the indorsement, though he is not for the note itself. The reasons upon the other side of the question are that the equities are in favor of the bona fide holder. Drunkenness ought not to be regarded, because it is the man's own fault.<sup>82</sup> It is not to be placed on the footing of insanity, because it is temporary. The law protects, and ought to protect, the helpless infant and the God-stricken insane, but should not the vicious or foolish drunkard. And of two aggrieved parties—the drunkard and the bona fide holder—it would seem

<sup>81</sup> *Gore v. Gibson*, 13 Mees. & W. 623; *State Bank v. McCoy*, 69 Pa. St. 204; *McSparran v. Neeley*, 91 Pa. St. 17.

<sup>82</sup> *Wilson v. Nisbet*, 2 Mor. Dict. 1509.



clearly that the equities of the latter should prevail.<sup>83</sup> In *Matthews v. Baxter*,<sup>84</sup> a man, while drunk, agreed at an auction to make a purchase of house and land. Afterwards, when sober, he affirmed the contract, and then repented of his bargain, and, when sued on the contract, pleaded that he was drunk at the time he made it. "I think," said the court, "that a drunken man, when he recovers his senses, might insist on the fulfillment of his bargain, and therefore he can ratify it so as to bind himself to a performance of it." In other words, the most that can be said of a bill or note signed by a man when drunk is that it is voidable, and not void. And certainly, despite the preponderating weight of authority to the contrary, it would seem but logical to say that if the man, on returning to his senses, fails to disaffirm his contract, it is too late for him to do so when it is in the hands of a bona fide holder.

When the intoxicated person is not bereft of his senses, there can be no doubt about the position. If the party were only in that state of pleasant exhilaration common in such cases, and was clear in his mind upon what he was doing, then intoxication is no defense. It may only be used as a means of showing fraud, for intoxication may have been used as a means of imposing upon the party to the instrument. But here the fraud, and not the intoxication, is the basis of defense. The party had capacity to incur an obligation, and the courts will enforce the obligation he has incurred. That his senses were clouded would be no excuse. The court could no more take that into consideration than it could that one party was sharper than another in making a bargain.

<sup>83</sup> *Berkley v. Cannon*, 4 Rich. Law, 136; *Northam v. Latouche*, 4 Car. & P. 145.

<sup>84</sup> *Matthews v. Baxter*, L. R. 8 Exch. 132.

## PROBLEMS.

(1) "With interest" is added to a bill silent as to interest. Is this alteration material or immaterial?

(2) B accepts a bill for \$100, drawn by A. This is the agreed price of goods to be supplied by A to B. When the goods arrive, they are found to be inferior to sample, and worth only \$80. B retains the goods. A sues B on the bill, and B defends that this is a defense pro tanto. Is it? Give your reasons.

(3) B, by way of gift, makes a note in favor of C. Can C sue B? Why?

(4) C, the holder of a bill, indorses it specially to D, in order that he may get it discounted for him. D, in breach of trust, negotiates the bill to E. E takes the bill bona fide and for value. Can he sue all the parties thereto? Can C bring an action against E to recover the bill or the proceeds?

(5) X indorses for the accommodation of B a note made by him payable to C. Before its issue, B inserts X's name as payee also, and delivers the note to C. Who, if any one, is liable on the note?

(6) B accepts a bill drawn by A, to accommodate him. A indorses it to C, without receiving value. C indorses it to D, without receiving value. Can D recover from B?

(7) C, the payee of a note for \$10, alters it into a note for \$110, and transfers it to D, who takes it for value and ignorant of the alteration. There was nothing in the appearance of the note to excite suspicion. The negligence of the maker in leaving blank spaces afforded the opportunity for the fraud. Can D recover from the maker?

(8) A draws a bill on B, payable to his own order. B accepts. The consideration between A and B fails. A subsequently indorses the bill for value to C. Can C sue B? State the law.

(9) A bill addressed to B & X, under the style of "B, X & Co.," is accepted by them as "B and X," and the address is afterwards altered to "B and X," to make it correspond with the acceptance. Was this alteration material or immaterial?

(10) X, by means of a false pretense, procures A to draw a check in favor of C. X delivers it to C, who receives it bona fide and for value. Can C sue A?

(11) B owes A \$50. A draws a bill on B for \$100. B, to accommodate A, and at his request, accepts it. If A sue B, how much can he recover?

(12) C, the holder of a bill, indorses it in blank and hands it to D, to retire certain other bills. He does not do so. If D sue the acceptor, may the acceptor set up the failure of D to perform?

(13) C adds "with interest" to a note, believing the added stipulation was omitted by mistake. Can C maintain suit on the bill, either as altered or as it was before alteration?

(14) A bill payable to C or bearer is converted into a bill payable to C or order. Is this a material or an immaterial alteration?

(15) B accepts a bill for \$100. This is the agreed price of two bales of cotton at \$50 each, to be supplied by A to B. A only delivers one bale. A indorses the bill to C, his agent, to collect. How much can C recover?

(16) C, the payee of a bill, indorses it to D. D sues C, as indorser. C sets up that he and D were jointly interested in the bill, and that he indorsed it to the latter to collect on joint account. Is this a defense?

(17) B makes a note payable to C, in consideration that C is to act as B's executor. C dies first. Can C's personal representatives enforce payment against B? Give reasons for your opinion.

(18) B makes a note payable to C, who sues him on it. B shows that the note was delivered to C on condition that it was only to operate if he should procure B to be restored to a certain office, and that B was not so restored. Can C recover?

(19) The words "on demand" are added to a note in which no time of payment is expressed. Is this a material or an immaterial alteration?

(20) A non-negotiable bill, in terms, is made negotiable. Is this a material or an immaterial alteration?

(21) A new maker is added to a joint and several note. Is this a material or an immaterial alteration?

(22) B authorizes A to draw on him against bills of lading. A draws a bill on B, and indorses it to C, with the bill of lading attached. C gives value to A. B accepts the bill on receiving from C the bill of lading. The bill of lading turns out to be a forgery, but C did not know it when he obtained the acceptances. Can C sue B? Give your reasons.

(23) X signs a note as surety, on condition that it shall not be delivered by B, the maker, to C, the payee, until signed by Y, as cosurety. The note is delivered contrary to the agreement. Is this a defense?

(24) A and C supply goods to B. A draws a bill on B for the price, and indorses it to C to collect on joint account. Is A liable to C on the bill?

(25) The *descriptio personae* is erased from the signature of a bill. Is this a material or immaterial alteration?

(26) A bill payable with "lawful interest" is altered by adding the words "interest at 6 per cent.," that being the statutory rate. Is this a material alteration?

(27) An indorsement in blank is converted into a special indorsement. Is this material or immaterial?

(28) A and C supply goods to B. A draws a bill on B for the price, and indorses it to C to collect on joint account. If the bill is dishonored, is A liable to C?



## CHAPTER VIII.

### THE PURCHASER FOR VALUE WITHOUT NOTICE.

- 148. What Constitutes.
- 149-150. Antecedent Debt as Consideration.
- 151. Bona Fides or Good Faith.
- 152-155. Notice, Actual and Constructive.
- 156-157. Time of Acquiring Notice.
- 158. Purchaser with Notice from Bona Fide Holder.
- 159. Purchase out of Usual Course of Business.
- 160. Overdue Paper.
- 161. Paper Payable at Sight or on Demand.
- 162-163. Constructive Notice Presumed.
- 164-167. Presumption and Burden of Proof—Order of Proof.
- 168-171. Summary of Position of Purchaser for Value without Notice.

### What Constitutes.

148. To constitute a purchaser of a negotiable instrument a purchaser for value without notice, the purchase must be:

- (a) Bona fide.
- (b) In the ordinary course of business.
- (c) Without notice of its dishonor.
- (d) Without notice of facts which impeach its validity between antecedent parties.
- (e) For a valuable consideration.

Note—"Bona fide holder," "innocent indorser," "bona fide holder without notice and for value," "purchaser in the usual course of business," "purchaser in due course," "holder in due course," "purchaser without notice," are terms indifferently and synonymously, though loosely, applied."

It remains to say but little more of the purchaser for value without notice. The whole theory of negotiable bills and notes of which we have given the salient points in the preceding pages of this book leads up to it. And, while this chapter is properly the climax of the work, to treat in it, at any length, of the purchaser for value without notice, would be to repeat what has been already set forth. There are but four points yet to be mentioned. They are that peculiar phase of the doctrine of consideration commonly called the "antecedent" or "pre-existing" indebtedness, and whether it does or does not sustain the position of the bona fide holder; of what notice as applied to negotiable instruments consists; the technical rules and practical methods of giving notice, which we shall take up in the next succeeding chapter; and, lastly, the presumptions of evidence which attach to a negotiable bill or note in its proof upon trials.

As has been said, any consideration which supports a contract, supports its transfer or indorsement. The meaning of "value" in the term "purchaser for value" means, "either money or money's worth."<sup>1</sup> It may be cash paid out. It may be goods given. It may be rights surrendered. It may be liabilities incurred. Anything which men in business call "property;" anything for which a court, on some one being deprived of it, would award damages; anything, in short, which has an appreciable propertied existence,—is value. And the purchaser who gives it in exchange for a bill or note is a purchaser for value, or a purchaser for a valuable consideration.

Before taking up and considering the peculiar phase of value known as the "antecedent" or "pre-existing" indebtedness, the student is asked to remember one thing, which has already been said in many different ways. It is that the

<sup>1</sup> Ames, Bills & N. p. 867.

purchaser, in order to entitle him to the immunities of negotiability, must be both a holder for value, and also a holder without notice. Both of these elements must concur in his holding. A purchaser for value may or may not be a purchaser without notice. A purchaser without notice cannot resist equities if he has paid no value, except as against accommodation parties. In the former case it makes little difference that the holder took the instrument and paid its face for it; in the latter, that he took the instrument in the truest faith. With this caution, let us turn to the question of the antecedent or pre-existing indebtedness.

### **Antecedent Debt as Consideration.**

**149. An antecedent or pre-existing debt is probably a sufficient consideration to a negotiable bill or note or the transfer thereof.**

**150. A bill or note transferred as collateral to an indebtedness is probably transferred upon a sufficient consideration.**

Antecedent indebtedness means a debt already existing at the time of the execution of a contract, whatever it may be. Such, for example, are a note for which a renewal note is given; or a debt of some kind, as a debt created in buying goods for which, at the expiration of the terms of credit for which the goods were sold, a note is given in extension. The importance of the doctrine relates almost always to the question whether the purchaser of the paper is a bona fide holder or not. If he is to be treated as a bona fide holder, then the claim is that certain defenses in favor of prior parties are ruled out. If he is not a bona fide holder, then any prior party may raise such defense as he has at the

suit of the person who has taken the note in consideration of the alleged antecedent indebtedness.

The wisest theory, all things being considered, is the doctrine of Judge Story in *Swift v. Tyson*.<sup>2</sup> Judge Story lays down the doctrine that receiving such paper in payment or as security for a pre-existing debt is receiving it for a valuable consideration. "Thus," he says, "it may pass, not only as security for new purchases and advances made upon the transfer thereof, but also in payment of and as security for pre-existing debts. In this way the creditor is thereby enabled to realize or to secure his debt, and thus may safely give a prolonged credit, or forbear from taking any legal steps to enforce his rights. The debtor also has the advantage of making his negotiable securities of equivalent value to cash. Otherwise, the discounts, by banks, of negotiable securities, are restricted, and credit and circulation of negotiable paper hampered." The doctrine in *Swift v. Tyson* is followed by the weight of authority throughout the United States. However, the courts of some jurisdictions and particularly of the state of New York have taken issue with the courts of the United States.

The law, by this conflict, is thrown into much confusion, from which the following general rules are deducible:

(1) Where the debt is contracted at the time of the transfer and on the faith of the bill or note or indorsement of a third party as collateral security, that debt itself forms a part of the consideration of the transfer.

(2) Where the debt is already contracted, but not yet due, at the time of the transfer, the pre-existing indebtedness is probably a sufficient consideration for the bill, note, or indorsement of a third party given as collateral for it.

(3) Where the pre-existing debt matures, and the bill or

<sup>2</sup>*Swift v. Tyson*, 14 Curt. Dec. 166, 16 Pet. 1.



note of a third party is given in the stead of securities surrendered at such maturity for a renewal, that surrender is probably a sufficient consideration.

(4) Where the pre-existing debt has fallen due, and there is a transfer of a bill or note as collateral security, with an express agreement for delay, that forbearance constitutes a sufficient consideration.

(5) Where the bill or note is transferred in absolute payment of a pre-existing debt, such release of indebtedness is a sufficient consideration.

The first principle is closely akin to that of the antecedent indebtedness, and is where the debt is contracted on the faith and transfer of a bill or note put up as collateral. There the courts<sup>3</sup> declare that such is a sufficient consideration to constitute the pledgee a bona fide holder to the extent that he is protected against defenses. The holder parts with property upon the faith, not only of a principal note, but also of the note put up as collateral. The two, in regard to the elements of consideration, are inseparable; so that whether the holder of a negotiable note receives it as collateral security for the payment of a loan of money, or whether he gives it upon the original paper, is one and the same.<sup>4</sup> In the state of New York the cases, having thus established the fact that such a holder is a bona fide holder, take a further step, which is remarkable. Its clear statement is found in *Huff v. Wagner*.<sup>5</sup> Assuming such a holder to be a bona fide holder, for his protection the law permits the original holder to transfer to the vendee such

<sup>3</sup> *Bank of State of New York v. Vanderhorst*, 32 N. Y. 553, at page 557.

<sup>4</sup> *Bank of Chenango v. Hyde*, 4 Cow. 567; *Bank of Rutland v. Buck*, 5 Wend. 66; *Youngs v. Lee*, 12 N. Y. (2 Kern.) 551; *Boyd v. Cummings*, 17 N. Y. 101.

<sup>5</sup> *Huff v. Wagner*, 63 Barb. 215.

a right to recover upon the paper as is required to indemnify him from loss. But it does not permit the purchaser to make a speculation out of the paper. Courts of equity, from which the legal rules affecting commercial paper in this respect are derived, do not extend their protection in favor of the purchaser beyond that limit. The holder, except so far as he has parted with value, has no equity superior to the person who has the defense; and therefore it is that the holder, taking paper as collateral, can only recover upon it to the amount of the loss which he suffers upon the original paper; that is to say, the amount for which the paper is itself put up as collateral. If the principal paper is entirely worthless, and in amount in excess of the paper put up as collateral, then he may recover the entire amount of the collateral; but otherwise, it is only what he loses on the principal paper which can measure his damages.<sup>6</sup>

Judge Story, in *Swift v. Tyson*, in what is really an obiter dictum, declares that the unauthorized transfer of negotiable paper to secure an antecedent debt is a transfer for value, and there are a number of cases in a large number of states in which this dictum was followed; so that, in fact, it has become the established law. It is particularly to be noticed that this has been determined to be the federal law governing the federal courts.<sup>7</sup> But in New York the rule is different, based upon rather restricted views of the theories of commercial paper. The leading case is *Bay v. Coddington*,<sup>8</sup> decided by Chancellor Kent. He explains the reason to be that notes so taken as collateral security were not like those taken in payment of any antecedent and existing debt created or responsibility incurred on the strength and

<sup>6</sup> *Park Bank v. Watson*, 42 N. Y. 490; *Platt v. Beebe*, 57 N. Y. 339.

<sup>7</sup> *Railroad Co. v. National Bank*, 102 U. S. 25.

<sup>8</sup> *Bay v. Coddington*, 5 Johns. Ch. 54, affirmed *Coddington v. Bay*, 20 Johns. 637.

credit of the notes. The learned chancellor restricts the considerations which shall protect the innocent holder to considerations given or allowed on the part of the party receiving it on the strength of that identical paper; and this theory, that the consideration must be given for the identical paper received, was followed in New York.<sup>9</sup>

The case of *Bay v. Coddington* was decided in 1821. In 1842, Judge Story's opinion in *Swift v. Tyson* controverted the positions taken in the opinion of Chancellor Kent. And this conflict brought forth a vehement opinion from Chancellor Walworth in 1843, in the case of *Stalker v. McDonald*.<sup>10</sup> In this opinion, which is long and well considered, Chancellor Walworth examines closely Judge Story's opinion, reviews and analyzes carefully the authorities upon which it was based, and concludes by affirming the opinion of Chancellor Kent. In a dictum Chancellor Walworth goes so far as to say that one who receives negotiable paper in payment of an antecedent debt is not a purchaser for value. And both of the positions, that paper taken as collateral security and also that paper taken in payment of an antecedent debt do not avail to make the holder a bona fide holder for value, have been adopted by many states of the Union.

It perhaps may not be out of place to give a few instances of what the courts have deemed a consideration sufficient to protect the holder. For this purpose New York decisions have been taken, but those decisions have been generally followed. In *Bank of Salina v. Babcock*<sup>11</sup> the holder discounted the notes in suit, and used the avails in discharge of other notes upon which there was a responsible indorser. This was held a surrender of securities which constituted

<sup>9</sup> *Francia v. Joseph*, 3 Edw. Ch. 182.

<sup>10</sup> *Stalker v. McDonald*, 6 Hill, 93.

<sup>11</sup> *Bank of Salina v. Babcock*, 21 Wend. 499.



value. In *Bank of Sandusky v. Scoville*<sup>12</sup> it was held a note of third persons, given in extinguishment of another note, was not given as security for a precedent debt, but was given for value. In *Mechanics' & Farmers' Bank v. Wixson*<sup>13</sup> a note given to secure a pre-existing debt, upon a promise to forbear prosecuting it, was given upon a sufficient consideration;<sup>14</sup> and also, when a note is taken in payment of the past-due note of the payee named in the note, or where it is taken in payment of any indebtedness fully accrued, then it is given on a good consideration.<sup>15</sup>

It is very difficult to classify and reconcile the rules that have governed the courts in expounding the doctrine of the antecedent indebtedness. The confusion arises from the great and deserved authority which attaches to any decision of Chancellor Kent. His decision in *Bay v. Codrington* has been followed in all the after decisions of the courts of the state of New York. It has had great weight throughout the Union; and, while it may be said of it that in its doctrine it is theoretically and legally more accurate than the position of Judge Story in *Swift v. Tyson*, as business policy it is certainly less sound. It tends to hamper the circulation of paper, because it restricts it to transactions of actual discount, or which amount to actual discount. It shakes public confidence in negotiable securities, because it impairs their usefulness as collateral. It nullifies their practicability as a substitute for money, because it treats them as mere extension of credit, and

<sup>12</sup> *Bank of Sandusky v. Scoville*, 24 Wend. 115.

<sup>13</sup> *Mechanics' & Farmers' Bank v. Wixson*, 42 N. Y. 438.

<sup>14</sup> *Watson v. Randall*, 20 Wend. 201; *Burns v. Rowland*, 40 Barb. 368; *Traders' Bank of Rochester v. Bradner*, 43 Barb. 379.

<sup>15</sup> *Mechanics' & Traders' Bank v. Crow*, 60 N. Y. 85; *Brown v. Leavitt*, 31 N. Y. 113; *Pratt v. Coman*, 37 N. Y. 440; *Chrysler v. Renols*, 43 N. Y. 209; *Weaver v. Barden*, 49 N. Y. 286.



cripples them as means of payment. The case of *Bay v. Coddington* was the decision of a profound lawyer, perhaps, but not of a wise legislator.

### Bona Fides or Good Faith.

**151. BONA FIDES OR GOOD FAITH**—In the purchase of paper, means its acquirement without notice, either actual or constructive, of any fraud, defect of title, illegality, or other defense arising through the acts either of the vendor or of prior parties to the paper.

“Bona fides or good faith” is a generic term for what is more strictly and technically called “notice.” If paper be purchased without anything which the law can construe into notice, it is spoken of in business parlance as being purchased in good faith. The purchaser is a bona fide purchaser. Where, on the other hand, the purchaser has what the law construes to be notice of defects or equities, then, as we shall see hereafter, he is a purchaser in bad faith or mala fide, and can secure for himself none of the advantages given by the commercial law to the bona fide purchaser. Bad faith at bottom resolves itself into a question of honesty or dishonesty, for guilty knowledge and willful ignorance alike involve the result of bad faith.<sup>16</sup> “It is predicated,” said Chief Justice Church, “upon a variety of circumstances, some of them slight, and others of more significance. A perfectly upright, honest man might sell a bond which had been stolen, and the explanation might prevent even the taint of wrong on his part, while the explanation, although falling far short of proof of actual guilt, might leave upon

<sup>16</sup> *Murray v. Lardner*, 2 Wall. 121.

the mind an apprehension that he either directly or impliedly connived at the wrong, or, at least, that he was willing to deal in securities, and keep his eyes and ears closed, so that he should not ascertain the real truth."<sup>17</sup> Good faith, then, is absence of knowledge or means of knowledge on the part of the purchaser of the facts which constitute the defense to the instrument. It is evidenced by the facts of each transaction. Its rules are the rules of notice which we are now about to take up.<sup>18</sup>

### Notice, Actual and Constructive.

152. Notice is either actual or constructive.

153. **ACTUAL NOTICE**—Means either knowledge or means of knowledge to which the purchaser dishonestly shuts his eyes.

154. **CONSTRUCTIVE NOTICE**—Means either knowledge to be derived from facts apparent on, or surrounding, or to be inferred from, the face of or from the facts surrounding the instrument itself, but of which the purchaser is not shown to have knowledge. Because these facts are thus evident, the purchaser is charged with knowledge of them.

155. Constructive notice is probably not presumed by suspicious circumstances alone attending the taking or purchase of the bill or note; nor does want of caution nor gross negligence alone create a presumption of notice. These, at most, are evidences to determine whether the purchaser had knowledge of the defense raised against him.

<sup>17</sup> Dutchess Co. Mut. Ins. Co. v. Hachfield, 73 N. Y. 228.

<sup>18</sup> Canajoharie Nat. Bank v. Diefendorf, 25 N. E. Rep. 402, s. c. 123 N. Y. 191.

The doctrine of notice is the outgrowth of the equitable maxim "that, where there are equal equities, the one which is prior in time must prevail." It arises in circumstances when several different and successive interests or claims upon the same subject-matter exist at the same time, and there is a contest between the owners of these interests, each seeking to assert his as the superior right. In such cases, where a person acquires a right to property with notice that another person has already a claim to it, he is deemed to take it subject to that claim. The first-named person has the superior right to the property, while the last-named person owns in subordination to this right. Lord Hardwicke has explained the reason to be that <sup>19</sup> "the taking of a legal estate after notice of a prior right makes a person a mala fide purchaser. This is a species of fraud and *dolus malus* itself; for he knew the first purchaser had the clear right of the estate, and, after knowing that, he takes away the right of another person by getting the legal estate. Now, if a person does not stop his hand, but gets the legal estate when he knew the right was in another, *machinatur ad circumveniendum*." And undoubtedly, in the language of our later day, it is an act savoring of fraud for a person who has knowledge of another's right to property to go on and acquire the property in violation of that other's right.

"Notice" is defined by Prof. Pomeroy <sup>20</sup> as "the information concerning a fact, actually communicated to a party, by an authorized person, or actually derived by him from a proper person, or else presumed by law to have been acquired by him, which information is regarded as equivalent in its legal effects to full knowledge of the fact, and to which the law attributes the same consequences as would be imputed to knowledge." This is a compendium of many

<sup>19</sup> *Le Neve v. Le Neve*, 2 Amb. 436.

<sup>20</sup> Pom. Eq. Jur. § 594.



definitions. It is fine spun, but certainly is accurate. Notice is classified as actual and constructive. Actual notice is a fact, while constructive notice is a legal inference from established facts. When the facts are not controverted, or the alleged defect or infirmity appears on the face of an instrument and is a matter of ocular inspection, the question is one of constructive notice and for the courts. Actual notice, in distinction to this, is not inferred from any presumption of law. Its meaning is defined by Judge Selden as being those circumstances or situations<sup>21</sup> where a person has knowledge of any fact sufficient to put him upon inquiry as to the existence of some right or title in conflict with that he is about to purchase. In such circumstances and situations he is presumed either to have made the inquiry and ascertained the extent of such prior right, or to have been guilty of negligence equally fatal to his claim to be considered a bona fide purchaser. It must not be understood that this information consists of vague rumors or hearsay statements because they are not treated by the courts as positive information. By information is meant knowledge directly brought home to a person, and facts such as would put a reasonably prudent man upon his inquiry. The inquiry must be such as, if prosecuted with reasonable diligence, would certainly lead to a discovery of the conflicting right.

Constructive notice is but vaguely defined, and its doctrine is hard to state clearly. Prof. Pomeroy, in analyzing this general subject, distinguishes it from actual notice, in that it assumes that no information of the direct fact sought to be charged has been brought home to the party. It is of two kinds: Prima facie and conclusive. In both, the principle underlies that there is no direct information of the

<sup>21</sup> *Williamson v. Brown*, 15 N. Y. 354.



fact sought to be charged brought home to the party, but from all the surrounding facts in evidence in the case the court will conclusively, or at least in the first instance, (*prima facie*,) presume the party to have known it.

An example of a case where the party may be presumed to be charged with *prima facie* constructive notice is given by Prof. Pomeroy as that of a party negotiating for the purchase of certain land, and seeing or learning that the land is not in the intended grantor's possession, but is possessed and occupied by a third person. The fact of possession is sufficient to put the expected grantee upon an inquiry concerning the nature of the occupant's interest. The criticism may be made of this definition that it is difficult to distinguish this *prima facie* constructive notice from the definition of "actual notice" given by Judge Selden; and, as far as its practical operation as a rule is concerned, such presumption of *prima facie* constructive notice may always be rebutted by the party showing in evidence that he did all that a reasonably prudent man could do to ascertain the fact with the notice of which he is sought to be charged, and did in fact fail to ascertain it.

The facts being conceded, the question of conclusive constructive notice seems to be whether, under the facts as proved, the law will impute notice to the party. Conclusive constructive notice is a question for the court, and not for the jury. Constructive notice is the legal inference from established facts; and when the facts are not controverted, or the alleged defect or infirmity appears on the face of the instrument, and is a matter of ocular inspection, the question is one of conclusive constructive notice, and one for the court. Whether, under a conceded state of facts, the law will impute notice to the purchaser is not a question for the jury.

There is one thing to be emphasized: The rights of the

purchaser are not to be affected by notice, whether it be actual or prima facie constructive notice, unless it clearly appears that the inquiry suggested by the facts disclosed at the time of the purchase would, if fairly pursued, result in the discovery of the defect existing, but hidden, at the time. There must appear to be in the nature of the case such a connection between the facts discovered and the further facts to be discovered that the former may be said to furnish a clue—a reasonable and natural clue—to the latter. There must be a natural or logical connection between them.<sup>22</sup> It is doubtless settled law that, although actual notice of a fact be not brought home to a purchaser, yet, if there be surrounding facts in the case so open and notorious that a man in the enjoyment of his senses could not have helped taking cognizance of some fact by reason of his knowledge of these notorious facts, then the law will impute knowledge to him of the fact sought to be charged.<sup>23</sup> But what is meant by this is that it is simply a question of good faith in the purchaser. Unless the evidence makes out a case upon which the jury would be authorized to find fraud or bad faith in the purchaser, it is the duty of the court to direct a verdict in the purchaser's favor. Notice of the defense to defeat a recovery means notice of such facts as would necessarily lead the mind to believe in their existence, not notice of such facts as would lead one to surmise the existence of a defense. This general rule was determined to be the law after considerable hesitation, and after full discussion and deliberation. It was because of the interests of commerce. It puts the consequences of neglect or misfortune upon the party upon whom they have fallen. It sustains the ready and safe transfer of negotiable paper to those who honestly purchased it for

<sup>22</sup> *Birdsall v. Russell*, 29 N. Y. 220.

<sup>23</sup> *Clafin v. Lenheim*, 66 N. Y. 301; *Page v. Waring*, 76 N. Y. 463.

value advanced.<sup>24</sup> A bona fide purchaser is not bound at his peril to be upon the alert for circumstances which might possibly excite the suspicions of wary vigilance. He does not owe to the party who puts negotiable paper afloat the duty of active inquiry to avert the imputation of bad faith. The rights of the holder are to be determined by the simple test of honesty and good faith, and not by a speculative issue as to his diligence or negligence. This doctrine prevails throughout the Union.

### Time of Acquiring Notice.

**156.** Notice, whether actual or constructive, to be effectual, must exist at the time of the acquirement of the paper.

**157.** If notice is received after acquirement, but before the whole amount to be paid is paid, it is effectual only as to the amount unpaid.

The principle is, that if the quasi fraud once taints the bill or note, or in other words, if the purchaser has knowledge of defenses or equities, when he takes the instrument, he is, in the view of the law, a participant in the fraud or wrong in making the purchase. It is then equitable and fair that the defenses should avail against him when he seeks to recover its value. No notice must exist at the time he takes the paper, and he must acquire the note upon an adequate or valuable consideration. The reason for this is the maxim that, where there are equal equities, the one prior in time is superior. There must be some value parted with to change the subsequent equity into a superior equity.

<sup>24</sup> *Magee v. Badger*, 34 N. Y. 247; *Belmont Bank v. Hoge*, 35 N. Y. 65; *Welch v. Sage*, 47 N. Y. 143; *Goodman v. Simonds*, 20 How. 365.



Value must be parted with before notice of the prior equity is brought home to the person paying the valuable consideration. It follows that, if the consideration is part paid and part unpaid before notice is received, then it is equitable and fair that the purchaser should be protected to the extent of the consideration paid.<sup>25</sup>

### Purchaser with Notice from Bona Fide Holders.

158. Even though the purchaser have notice of some equity existing in favor of a party to the instrument, still it will not avail if his vendor or some party between the purchaser and the party in favor of whom the equity exists is a bona fide holder for value.

If notice is given after the acquirement of an instrument bona fide, and for a consideration, it does not avail, because at that time all rights are fixed, and cannot be disturbed by an *ex post facto* notice. So far does this doctrine go that even if the purchaser has notice that there was fraud in the inception of the paper, or that it was lost or stolen, or that any defense exists between prior parties, yet, if his immediate indorser was a bona fide holder for value unaffected by any of these defenses, he will be subrogated to his rights, and these defenses will not avail against him. As soon as the paper comes into the hands of a holder unaffected by any defect, its character as a negotiable security is established, and the power of transferring it to others with

<sup>25</sup> *Dows v. Kidder*, 84 N. Y. 121; *Seymour v. McKinstry*, 12 N. E. Rep. 348, s. c. 14 N. E. Rep. 94, s. c. 106 N. Y. 230; *Weaver v. Barnden*, 49 N. Y. 286; *Dresser v. Missouri*, 93 U. S. 92; *Garland v. Salem Bank*, 9 Mass. 408.



the same immunity which attaches in his own hands is necessary to the immunities and the full enjoyment of the property rights of the bona fide holder.<sup>26</sup>

### Purchase out of Usual Course of Business.

159. Constructive notice is probably presumed when the bill or note is taken out of the usual course of business. A purchase in the usual course of business means a transfer of a bill or note according to the usages and customs of commercial transactions.

The term "due or usual course of business" has been defined to mean "according to the usages and customs of commercial transactions." It is commonly understood in the sense of taking for value and without notice. The question whether negotiable paper was taken in the regular course of business usually resolves itself into the inquiry whether mercantile paper is ordinarily used in the manner in which the paper was used, and whether a business man would ordinarily have received the paper under the circumstances in which it was offered, and have parted with his property for it.<sup>27</sup> The meaning of this expression has been somewhat discussed by the courts of Iowa.<sup>28</sup> The view of those courts seems to turn upon the point whether a man of ordinary business experience would have been willing

<sup>26</sup> *Ballard v. Burgett*, 40 N. Y. (1 Hand.) 314; *McNeil v. Tenth Nat. Bank*, 46 N. Y. (1 Sickles,) 325; *Northampton Nat. Bank v. Kidder*, 12 N. E. Rep. 577, s. c. 106 N. Y. 222; *Edw. Bills & N.* § 441; *Farmers' Bank v. Noxon*, 45 N. Y. 762; *Miller v. Talcott*, 54 N. Y. 114; *Eckhart v. Ellis*, 26 Hun, 663.

<sup>27</sup> *Edw. Bills & N.* § 519.

<sup>28</sup> *Moore v. Moore*, 39 Iowa, 461; *Iowa College v. Hill*, 12 Iowa, 462.

to purchase paper circumstanced as the paper was in the cases before them with the expectation of an easy and safe recovery. Thus, a bill or note in the hands of one not the payee, and unindorsed, where it is not payable to the payee or bearer, would be an instance of this. Such is not the usual course of business. The title to a bill or note taken by operation of law is not taken in course of business. In *Briggs v. Merrill*<sup>29</sup> the question occurs, and it is said that such persons acquire title by legal process, and not in the regular course of dealing in commercial paper. They pay no value for it. They can only be deemed as occupying exactly the position of the person from whom they derived the note because they are in a measure in law his representatives.

### Overdue Paper.

**160. Constructive notice of a defense or equity arises in case of a bill or note wherein the date of payment is specified when that bill or note is circulated when overdue.**

Chief Justice Shaw<sup>30</sup> has stated the reasons so forcibly that, in addition to what has already been said, we cannot do better than quote it: "When a negotiable note is found in circulation after it is due, it carries suspicion on the face of it. The question instantly arises: Why is it in circulation? Why is it not paid? Here is something wrong. Therefore, although it does not give the indorser notice of any specific matter of defense, such as set-off, payment, or fraudulent acquisition, yet it puts him on inquiry. He takes only such title as the indorser himself has, and subject to

<sup>29</sup> *Briggs v. Merrill*, 58 Barb. 399.

<sup>30</sup> *Fisher v. Leland*, 4 Cush. 456.

any defense which would be made if the suit were brought by the indorser. The note does not cease to be negotiable. The indorsee takes title, and may sue, but he is so far in privity with his indorser that he takes only his title; and, if the defendant could make any defense against a suit brought by such indorser, he can make it against the indorsee.

### Paper Payable at Sight or on Demand.

161. Constructive notice of an equity or defense does not arise in case of a bill or note payable at sight, or on demand, until after the expiration of a reasonable time, to be determined from the circumstances of the case.

The principle which prevails throughout the cases is that bills or notes payable at sight or on demand shall be deemed due within a reasonable time. The meaning of a reasonable time depends upon the circumstances of each case. The point of inquiry is, has the paper been outstanding so long after its date as to put the purchaser upon inquiry, and charge him with notice that there is some defense to it? It must be taken into consideration that bills of exchange are not always transmitted for payment directly to the acceptor, but first pass through the hands of several intermediate holders in the ordinary course of business. They are purchased by travelers, to be carried by them instead of coin, and other circumstances of that character, all of which are to be taken into consideration.

### Constructive Notice Presumed.

162. Constructive notice is presumed by the fraudulent turning away or willful blindness of the holder, as distinguished from want of caution, to the facts which constitute an equity.

The statement of the rule by the authorities is somewhat illy defined, owing to confusing the rules that apply to choses in action, other than negotiable paper, with the rules governing negotiable instruments. The student will gain perhaps the clearest conception of it by a statement of the rule, as it is applied to choses in action other than negotiable instruments, and contrasting it as it is applied to negotiable instruments themselves. The former rule<sup>31</sup> presupposes that no actual notice of an equity has been given, and yet that the purchaser has had sufficient knowledge to put him on inquiry. We may assume facts are proved to have been within his knowledge which ought to have excited his suspicion. It is impossible to specify what these facts are. They depend largely upon each particular case. But the facts must be such as not to have inquired into them would be gross carelessness, and such that, had the purchaser pursued the investigation, it would have surely led him to discover them. With ordinary choses in action, it is legitimate for the jury to consider whether the vendee had knowledge of facts pointing to a fraudulent intent, or calculated to awaken suspicion. Actual notice of fraudulent intent need not be established by direct proof. The fact of notice or knowledge may be inferred from circumstances. The jury

<sup>31</sup> Baker v. Bliss, 39 N. Y. 70; Cambridge Bank v. Delano, 48 N. Y. 326; Bennett v. Buchan, 76 N. Y. 386; Parker v. Conner, 93 N. Y. 118.



may be satisfied that the purchaser was in fact entirely innocent, and free from any guilty knowledge or even suspicion of fraud; but, if they find that facts were known to him which were calculated to put him on inquiry, his want of diligence in making such inquiry is equivalent to a want of good faith, and the presumption of notice is a legal presumption, which is incontrovertible. To this extreme limit do the courts go with choses of action other than negotiable paper.

But there is authority to show<sup>32</sup> that this is not the doctrine of negotiable paper. While these are evidences of actual notice, yet actual notice is not necessarily presumed from them. In case of negotiable instruments the law declares that there must be something proved amounting to bad faith in the holder, such as fraudulent turning away from a knowledge of the facts. Want of caution, however great, as distinguished from fraudulent or willful blindness, does not affect the holder with notice.

### Constructive Notice Presumed, (Continued.)

163. Constructive notice is perhaps presumed by the payment of a consideration for a bill or note, or the transfer thereof, so small as to leave no opportunity for conjecture but that the purchaser must have known that they could not have originated from any but a corrupt source.

Senator Daniel,<sup>33</sup> commenting upon the remark of Justice Story<sup>34</sup> that "it would be sufficient if the circumstances

<sup>32</sup> Jones v. Gordon, L. R. 2 App. Cas. 616; Freeman Nat. Bank v. Savery, 125 Mass. 75.

<sup>33</sup> Daniel, Neg. Inst. § 796.

<sup>34</sup> Story, Prom. Notes, § 197.

are of such a strong and pointed character as necessarily to cast a shade upon the transaction, and to put the holder upon inquiry," explains it in this way: He says that, in his opinion, the circumstances must be so pointed and emphatic as to amount to proof of *mala fides* in the abstinence from inquiry, or such as to be *prima facie* inconsistent with any other view than that there is something wrong in the title, and thus amount to constructive notice; and he continues that, if the circumstances are of such a character as to create such a distinct legal presumption and *prima facie* proof of fraud or of some equity between prior parties, it would operate as legal information and constructive notice to the transferee. A specific instance of the application of this general rule is when the holder offers to take for a negotiable instrument a sum so small that the only reasonable interpretation could be that there is something wrong about it. This is not gross negligence; it is considered willful blindness, and an abstinence from inquiry, so great that the court would treat it as bad faith. The reason is that it is in contravention of the habit of business men to sell valuable rights for almost nothing, and the courts deem an act such as this is a necessary implication of fraud.

A modified form of this rule is found in New York courts.<sup>35</sup> When it appeared from the evidence that notes were obtained through a gross swindle, also that the note was bought for half price, but no evidence was offered of the good faith of the plaintiff in buying the notes, it was held that good faith under such a purchase was not presumed, but the plaintiff must show his good faith. Soon afterwards the same point came up in a little different form, and, the plaintiff showing by the evidence his good faith, it was held he was entitled to recover. Thus, the New York

<sup>35</sup> *Vosburgh v. Diefendorf*, (Sup.) 1 N. Y. Supp. 58; *Richmond v. Diefendorf*, 4 N. Y. Supp. 375, 51 Hun, 537.

courts do not go to the full extent of the doctrine. They hold what seems the wiser doctrine, that the smallness of the consideration is a circumstance of suspicion which throws the burden of proof on the holder. But it is not conclusive evidence of notice. It is merely evidence which, if undenied, will destroy the bona fides of the transaction.

### Presumption and Burden of Proof—Order of Proof.

164. The holder of a bill or note is, in the first instance, presumed to be a bona fide holder without notice; but, if it is shown that the bill or note was in its issue or negotiation affected by certain defenses, then it is incumbent for the holder to show that he is a purchaser for value without notice. Upon such proof he may recover.

165. The usual order of proof for a recovery is:

- (a) To produce the paper sued on.
- (b) To prove the signatures, and, if the action is against the indorser of a bill or note or drawer of a bill, to prove the necessary indorsements.
- (c) To prove presentment and demand and dishonor, or circumstances to excuse it.
- (d) Notice of dishonor to the indorser, or circumstances to excuse it.

Note—In some jurisdictions the mere possession is sufficient to maintain the action, but this is not the law in New York under the Code, § 449.\*

\*Hays v. Hathorn, 74 N. Y. 486-491.

166. Upon proof of the facts specified in the foregoing section, the holder may rest for his recovery until evidence is adduced showing:

- (a) That the holder when he took the paper had notice of the equities.
- (b) Or that there was fraud, duress, or illegality in the inception of the contract, or its negotiation was in fraud of the rights of the defendant, or that it was lost or stolen.

167. Upon proof of facts specified last above, the purchaser must show that he is a purchaser for value without notice.

The possession of a note or bill made payable to bearer or indorsed in blank by the payee thereof is prima facie proof of ownership or title, and sufficient, in the absence of other proof, to entitle the holder to recover on proving the indorsement. The reason is that the holder is deemed prima facie to have the title. The production of the instrument, together with proof of the defendant's signature and the possession of the note, carries with it a legal presumption also of such delivery of the instrument as is necessary to its legal inception.<sup>36</sup> The amount due upon the note is prima facie supposed to be that stated in the body of the instrument.<sup>37</sup>

Thus, the presumptions inferred by a court from the mere production of an instrument are:

- (1) That there was a sufficient consideration for a promise or an order.
- (2) That this promise or order was to pay a definitely specified sum of money.

<sup>36</sup> *Sawyer v. Warner*, 15 Barb. 282.

<sup>37</sup> *Abb. Tr. Ev.* p. 410; *Norwich Bank v. Hyde*, 13 Conn. 282.



(3) That this contract has full proper legal inception.

(4) That the person who comes to the court with the instrument to recover upon it lawfully owns the instrument sued upon.

(5) It is probably the presumption with notes payable to bearer or indorsed in blank, if the action be brought by an indorsee, that the note was transferred before maturity in good faith, and in the regular course of business.

These being the facts in a suit by an indorser, the question naturally becomes, what in such a suit must be proved?

As we have tried to show, there are certain defenses which, if proved, make recovery even by the bona fide holder hopeless. There are, as we have also tried to show, certain other defenses, which, even if proved, still will not defeat a recovery by the bona fide holder. In our comments on the order of proof, we are to be understood as speaking of the latter class. What now, in a suit by an indorsee against prior parties, is the usual order of proof, and the rules regulating it? Having once produced the paper with the presumptions we have mentioned attached to it, it becomes necessary to prove the following facts:

(1) If the action is by the payee against the maker or acceptor, prove the maker's or acceptor's signature. It is unnecessary to prove a demand of the maker or acceptor because the suit is itself a sufficient demand, as is the case with all other claims.<sup>38</sup>

(2) In an action brought by an indorsee against the acceptor, the holder must prove the signatures of acceptor, and also the payee. The proof of the latter signature is not for the purpose of fixing the liability of the payee, but of proving that the title is in the holder.<sup>39</sup>

<sup>38</sup>Green v. Goings, 7 Barb. 652.

<sup>39</sup>Coggill v. American Exch. Bank, 1 N. Y. (1 Comst.) 115; Canal Bank v. Bank of Albany, 1 Hill, 287.

(3) In an action against an indorser of a bill or note, the plaintiff need not prove the signature of the maker, drawer, or prior indorsers, because, on proof of the defendant's signature, the indorser is deemed to warrant that of the prior indorsers. In such case it is necessary to prove only the signatures of the persons sought to be recovered against.

(4) In case of a note or bill payable in blank or to bearer, no proof of claim of title by proving signatures of indorsers is necessary; but, where it is sought to recover against a party from whom title is derived through special indorsements, the signatures of special indorsers must be proved.

(5) Where the recovery is sought against a drawer or an indorser or indorsers, the plaintiff, in addition to this fact, must prove that the paper was duly presented for acceptance or payment, and dishonored, and that due notice thereof was given to the defendant.

The foregoing is usually the *prima facie* case of the plaintiff. The character of the further evidence necessary for the bona fide holder divides itself into two classes: (1) Cases where the defense is the lack or failure of consideration or of the payment of the note; (2) cases where the defense is fraud, duress, or the illegality of consideration.

(1) The presumption is that the indorsee of a negotiable bill or note is a bona fide holder for value. This presumption is not repelled merely by proof that the bill or note, as between the immediate parties, was without consideration, or was made, indorsed, or accepted by one for the sole accommodation of the other. When no other proof is given, the holder is not bound to prove a valuable consideration. Thus, unless the defendant prove that the plaintiff had notice of the fact of such want or failure of consideration or of the payment of the note, or, if it is a question of accommodation paper, that there was a misappropriation or

diversion of the instrument, then these facts are irrelevant, and the evidence will not be received.<sup>40</sup>

(2) In regard to defenses of fraud, duress, or illegality of consideration, the rule of evidence, when these defenses are proved, is that some further proof is incumbent upon the holder. Here the plaintiff does not establish for himself the character of a bona fide holder by merely producing the note and proving that he paid value for it; nor is the burden of proving notice to the plaintiff of the facts connected with the execution of the note and of the fraud, if any, upon the defendant. The plaintiff, in the absence of any such proof of notice to him, cannot recover.

Cases of fraud and duress stand upon the same footing. In the often-quoted case of *Duncan v. Scott*,<sup>41</sup> where a bill was given by the defendant under coercion and fear of death, Lord Ellenborough said: "It is incumbent upon the plaintiff to give some evidence of consideration;" and this principle has been followed in many cases in England, and in most of the states of the United States. It has been explained to mean that a plaintiff suing upon a negotiable note or bill purchased before maturity is presumed, in the first instance, to be a bona fide holder. But when the maker has shown the note was obtained from him under duress, or that he was defrauded of it, the plaintiff will then be required to show under what circumstances and for what value he became a holder. The reason for this rule is that, where there is fraud, it is but reasonable to suppose that he who is guilty of it will part with the note for the purpose of enabling some third party to recover upon it. Such presumption operates against the holder; and it therefore

<sup>40</sup> *Mechanics' & Traders' Bank v. Crow*, 60 N. Y. 85; *Harger v. Worrall*, 69 N. Y. 370.

<sup>41</sup> *Duncan v. Scott*, (1807,) 1 Camp. 100.



devolves upon him to show what value he gave for it.<sup>42</sup> So that, in case of duress or fraud, it is incumbent upon the holder to show value and lack of notice in rebuttal of the duress or fraud in order to maintain his action.

The degree of proof required in the cases of illegality is the same as that in cases of fraud and duress, and for the same reason that one whose title is thus tainted would probably put the paper into the hands of a friend for the purpose of recovery. In the same way it is deemed good sense that the burden should be cast upon the plaintiff to show that he took the paper for value in good faith. The earlier cases declare that the holder need not show he had no notice, but need only show he paid value, because the burden of showing notice is upon the party who seeks to impeach the title. The Massachusetts and New York courts, however, maintain, and properly, that, in addition to proving value, the holder should prove that he bought the note in good faith. It is necessary to show that the purchaser had no knowledge or notice of the fraud.<sup>43</sup> This is because of the reason that, where there is fraud, the presumption is that he who is guilty will part with the note for the purpose of enabling some third party to recover upon it, and that such presumption will operate against the holder, and it is deemed sound that the burden of proof should change. It is incumbent, then, that the holder should show that he had no notice or knowledge of the fraud with which the instrument was tainted in its origin. He should show, also, that he paid value for the note; and, if these are disputed as facts, they must be passed upon by the jury.

<sup>42</sup> *First Nat. Bank v. Green*, 43 N. Y. 298; *Wilson v. Rocke*, 58 N. Y. 642; *Harger v. Worrall*, 69 N. Y. 370.

<sup>43</sup> *Canajoharie Nat. Bank v. Diefendorf*, 25 N. E. Rep. 402, s. c. 123 N. Y. 191; *Vosburgh v. Diefendorf*, 23 N. E. Rep. 801, s. c. 119 N. Y. 357.



**Summary of Position of Purchaser for Value without Notice.**

168. A purchaser for value without notice may recover upon a negotiable instrument, and has a title, although any of the following defenses exist between antecedent parties:

- (a) Fraud.
- (b) Duress.
- (c) Lack or failure of consideration.
- (d) Illegality of consideration, which does not avoid the note.
- (e) Payment before same is due, or accord and satisfaction.
- (f) Perhaps insanity.
- (g) Perhaps intoxication.

169. A purchaser for value without notice cannot recover upon the instrument, when the instrument is void, because the party had no capacity to make it. The common defenses are:

- (a) Perhaps infancy.
- (b) Coverture in some jurisdictions.
- (c) In case of adjudged lunatics and drunkards.
- (d) Perhaps in case of insanity or intoxication.

170. A purchaser for value without notice cannot recover upon the instrument where statutory enactment declares the instrument to be void in the hands of all parties. The common defenses are:

- (a) Usury.
- (b) Gaming consideration.

171. Where the instrument purchased by a bona fide holder for value without notice does not truly

evidence the agreement between the parties, he cannot recover upon it. The common defenses are:

- (a) **Material alteration.**
- (b) **Cancellation.**

### PROBLEMS.

(1) B owes C \$50. In order to pay C, A, at B's request, without value, draws a bill on B for \$50, in favor of C, which C accepts in payment of the debt. Can C sue A and recover?

(2) C, the holder of a bill for \$100, indorses it to D as a pledge for \$50. How much can D recover if C forfeits his pledge, and he sues the maker.

(3) C indorses to D a bill for \$100, to be paid for by two installments of \$50. At the time D gets the bill, he pays one installment. Before D pays the second installment, he receives notice that C obtained the bill by fraud. D subsequently pays the second installment. What sum is D entitled to recover on the bill?

(4) Bill to the drawer's order accepted to stifle a prosecution for felony, and indorsed to C for value. Can C sue the acceptor and the drawer?

(5) C, the holder of a bill payable to his order, transfers it to D for value, but without indorsing it. C has obtained this bill by fraud from the maker, but D has no notice of this. Can D recover of the maker?

(6) B makes a note in favor of C. C is the treasurer of a loan society, and the consideration for the note is money advanced by the society to B. Is C a holder for value?

(7) Action against the maker of a note payable to bearer. It is shown to have been stolen from the true owner. What must the holder prove?

(8) C, a partner in a firm, fraudulently indorses a firm bill to D in payment of a private debt. F is cognizant of the fraud, but is not a party to it. D indorses the bill to E, who takes it for value and without notice. E indorses it to F for value. The firm on suit set up the fraud. Can F recover?

(9) B makes a note payable to C. C indorses it to D, who sues B. B proves on his defense that he made the note for a consideration based upon an illegal consideration, but not a part of it. Can D recover? What is his course of proof?

(10) C, the holder of a bill, indorses it in blank to D, receiving no value. D, for value, before due, transfers it by delivery to E, who receives it without notice. Can E recover if the maker sets up the note was paid?

(11) D, the holder of a bill indorsed in blank, transfers it to E for value. E suspects that D had obtained the bill by a false representation, and consequently makes no inquiries. As a fact, D stole the bill. Is E affected with notice? Would your opinion change if the bill were non-negotiable?

(12) C, who resides abroad, transmits to D, his agent in England, a bill as collateral security for his account. C has obtained this bill by fraud, but D does not know it. At the time D receives the bill, C is indebted to him on the balance of a long-existing account. Can D recover of the acceptors, from whom C fraudulently obtained the bill?

(13) A draws a bill on B, and indorses it to C. C sues B. The defense shows that B accepted it for A's accommodation. What proof must C give?

(14) A draws a bill on B, payable to his own order. B accepts it for a consideration, which by statute avoids it. A indorses it to C, who takes it for value and without notice. Against whom can C recover?

(15) A draws a bill on B, payable to his own order. B accepts. It is afterwards arranged that the bill shall be canceled. B accordingly tears it in half. A subsequently picks up the pieces, pastes them loosely together, and indorses the bill to C, who takes it for value, and without knowledge of the fact of its having been canceled. Can C recover?

(16) C, the holder of a bill obtained from the drawer by fraud for \$100, deposits it with D as security for a running account. At the time the bill matures, the balance is against C to the extent of \$50. Can D sue the drawer and recover?

(17) C, the payee of a bill, holds it for value. He indorses it to D for collection. Is D, as regards the drawer and acceptor, a holder for value?

(18) The holder of a bill indorses it to D to get it discounted. D fraudulently negotiates it to E, who negotiates it to F. F sues the acceptor, who gives evidence of D's fraud. What must F then seek to prove?

(19) D holds a bill indorsed in blank as agent for C. D wrongfully pledges it with E for \$50. E took the bill without notice of the fraud. Can E retain the possession of the bill as against C?

(20) B makes a note payable to C, the consideration for which is a wager. C indorses it to D, who sues B. Evidence is given of these facts. Under what circumstances can D recover?

(21) A draws a bill on B, payable to C, and delivers it to the latter. B accepts the bill while in C's hands. Are B and C immediate or remote parties?



## CHAPTER IX.

### OF PRESENTMENT AND NOTICE OF DISHONOR.

- 172. Presentment in General.
- 173. Presentment for Acceptance.
- 174-175. Manner of Presentment.
- 176-177. Time of Presentment.
- 178-179. Who may Make Presentment—Protest.
- 180. Place of Presentment for Acceptance.
- 181. Hour of Presentment.
- 182-183. Effect of Non-Acceptance—Protest.
- 184. Effect of Non-Presentment.
- 185-186. Notice of Non-Acceptance.
- 187-189. Place of Presentment for Payment.
- 190. Time of Presentment for Payment.
- 191. Effect of Non-Presentment for Payment.
- 192. Definition of Notice of Dishonor.
- 193. Elements of Notice.
- 194. Description of Instrument in Notice.
- 195. Statement of Presentment, Demand, etc., in Notice.
- 196-197. By and to Whom Notice Given.
- 198-200. To Whose Benefit Notice Inures.
- 201-203. Method of Giving Notice.
- 204-206. Time of Giving Notice.
- 207-208. Waiver of Presentment and Notice.

### Presentment in General.

**172.** The presentment of a bill or note is commonly as follows:

- (a) Of a bill for acceptance.
- (b) Of a bill or note for payment.

The doctrines of presentment, protest, and notice of dishonor relate peculiarly to the liabilities of the drawer and

indorser. These acts, on the part of the holder, are a condition or stipulation which the law merchant embodies in the contracts of each of them. They are so much the essence of the contract that, unless the holder fulfills them in exact accordance with the requirements of law, he cannot in most circumstances enforce the instrument. We have already pointed out that the law construed the contract of the drawer and also of the indorser to be distinct promises to every party who subsequently takes the instrument to pay the instrument if the acceptor or maker does not; and we have also pointed out that the law implied as a condition of the enforcement of this contract of indemnity that the holder should first seek the payment of the instrument from the persons primarily liable to pay it. If the holder failed in collecting the instrument from them, there was prescribed a system of formalities to be strictly followed to enable the holder to claim at the law's hands the enforcement of the drawer's or indorser's liability. These formalities are usually, though perhaps inaccurately, known as "presentment," "demand," "non-payment," "protest," and "notice of dishonor," some or all of them to be followed according as the case may be; and it is our purpose to take up each of these steps in their order, to show their nature and the rules relating to them.

### **Presentment for Acceptance.**

**173.** Where it is sought to charge the drawer and indorsers, presentment for acceptance, except in cases of bills payable at sight or after sight or after demand, may be made at any time before maturity.

The dishonor of a bill of exchange is the non-compliance on the part of the drawee with the conditions, which the law

has construed to be embodied in the order contained in it. The order contained in a bill of exchange on the part of the drawer is (1) an order on the drawee to accept the bill on presentation; (2) an order on the drawee to pay the bill at maturity. The refusal of the drawee to do either of these things dishonors the bill. The contract which the drawer thus makes with the holder is that the drawee will accept the bill. It differs slightly in cases of bills payable after sight and bills payable after a given date. In case of a bill made payable after sight, the contract is that the drawee, on the bill being presented to him in a reasonable time from the date, shall accept it, and, having so accepted, shall pay it when duly presented for payment. In case of a bill payable after date, the contract of the drawer is that the drawee shall accept it if it is presented to him before the time of payment; and, having so accepted, shall pay it when it is in due course presented for payment. Presentment for acceptance is not, however, absolutely essential, for, if the bill is not presented for acceptance at all, nevertheless the drawer makes a contract that the drawee shall pay it when duly presented for payment. And, even in case of the non-acceptance of the bill, the drawee still may pay the bill at maturity. The reason for this last position is that protest for non-acceptance is only for the security of the holder. He has the option of seeking a remedy for non-acceptance or a remedy for non-payment. He cannot, however, assert that the instrument is not paid until the time for payment arrives. The holder, having, by protest and notice of non-acceptance, put himself in a condition to sue the drawer, may very reasonably, as a matter of prudence, retain the bill, and endeavor to obtain payment when the bill has arrived at maturity, and not involve himself in a litigation until there has been a failure of payment as well as of acceptance. The nature of the right which the holder acquires

on the default of the drawee to accept is this: By non-acceptance, followed by protest and notice, the holder acquires an immediate right of action on the bill itself to recover from the drawer the full amount of the bill. The effect of the refusal to accept is that the drawee says to the holder: "I will not pay your bill. You must go back to the drawer, and he must pay you." The holder thus acquires by the non-acceptance a right of action against the drawer.<sup>1</sup>

The contract of the indorser stands upon a little different footing. The elements of the drawer's contract, based upon the meaning of the order contained in the bill, are absent from the terms which the law construes for the contract of the indorser. The indorser makes simply a contract of indemnity against loss. It is immaterial whether the bill be payable after sight or after date. He guaranties payment, not the acceptance of the bill. His position in law has been stated thus:<sup>2</sup> The indorser of a bill of exchange, whether payable after date or after sight, undertakes that the drawee will pay it if the holder present it to him at maturity and demand payment; and if he refuse to pay it, and the holder cause it to be protested, and due notice be given to the indorser, then the indorser promises to pay it. These conditions enter into and make part of the contract between the parties. The law imposes the performance of them upon the holder, as conditions precedent to the liability of the indorser; and, to fix the liability of the indorsers, presentment to the drawee or the maker either for acceptance or payment, and demand either for acceptance or payment, are necessary conditions precedent.

The various phases and rules relating to presentment are thus logically first to be examined. These, in many in-

<sup>1</sup> Whitehead v. Walker, 9 Mees. & W. 506.

<sup>2</sup> Musson v. Lake, 4 How. 262.



stances, are the same both in case of presentment for acceptance and in case of presentment for payment. Where they are the same, in order to avoid repetition, we have briefly noted it under the rule. Where they differ, the rules are fully set out both in the division under which we discuss presentment for acceptance, and also in that in which we discuss presentment for payment. Keeping this in mind, we shall examine the subject of presentment (1) as to the manner of presentment; (2) as to the time of presentment; (3) as to the person making presentment; (4) as to the place of presentment; (5) to whom presentment should be made.

### Manner of Presentment.

**174. A bill is presented for acceptance by exhibiting it to the drawee, and requesting its acceptance.**

Note—The foregoing section applies also to presentment for payment.

**175. When presentment is made for acceptance, the instrument must be in the possession of the person presenting the same.**

Note—The foregoing section applies also to the case of presentment for payment.

In order to make a proper legal presentment, there must be an actual exhibition of the paper.<sup>3</sup> This is the established law as regards presentment for payment. It is probably the law as regards presentment for acceptance; and certainly, in those jurisdictions where it is required that the acceptance should be written on the paper, a demand for acceptance would clearly be futile unless the paper were at hand to write the acceptance upon it. In case of a presentment for payment, the reasons for a personal present-

<sup>3</sup> Daniel, Neg. Inst. §§ 462, 463; Edw. Bills & N. § 538.

ment and an exhibition of the bill<sup>4</sup> are—First, that the acceptor or maker may judge of the genuineness of the bill; second, that the acceptor or maker may judge of the right of the holder to receive the contents; and, third, that the acceptor or maker may obtain immediate possession of the bill, upon paying the amount. So, also, in case of presentment for acceptance, the acceptor has a right to see that the person demanding it has a right to do so before he is bound to answer whether he will accept or not. The later cases have somewhat modified this rule in regard to the actual production of the instrument. If the holder has the bill or note with him at the time of presentment, and so describes it as to leave no doubt but that the maker understands what the instrument in question is, and the drawee, acceptor, or maker does not require him to produce it, then a refusal or omission to accept or pay will subject all parties to the consequent penalties.<sup>5</sup> The instrument must certainly be in the possession of a person presenting it for payment; and it would seem to be the better reason that, alike in cases of presentment for acceptance and for payment, the instrument should be at least in the actual possession of the person making such presentation, whether exhibited or not. So far as the demand is concerned, it should in ordinary cases be verbal; but in some cases this may be impracticable or not in reason to be required. In such cases it may be in writing; but, however made, it should be absolute, requiring present actual payment.<sup>6</sup>

<sup>4</sup>Musson v. Lake, 4 How. 262.

<sup>5</sup>Etheridge v. Ladd, 44 Barb. 69; Ocean Bank v. Faut, 50 N. Y. 475.

<sup>6</sup>Strong, Notes, § 242.

### Time of Presentment.

176. Bills payable at sight or on demand, or so many days after sight or after demand, or after any other uncertain event, must be presented for acceptance within a reasonable time.

Note—The foregoing section applies also in case of presentment for payment.

177. A reasonable time probably is a mixed question of law and fact, to be determined by the jury according to the circumstances of each case and under the instruction of the court.

Note—The foregoing section applies also in case of presentment for payment.

A bill payable after sight, or a certain number of days after sight, must be presented either for acceptance and payment, or for acceptance only, without unreasonable delay. The drawer and indorsers otherwise are discharged. They have an interest in having the bill accepted immediately. It is important for them to shorten the time of payment, and thus to put a limit to the period of their liability. It is also important for them to enable them to protect themselves by other means before it is too late, if the bill is not accepted and paid within the time originally contemplated by them. A bill payable at a day certain, or at a fixed time after its date, stands upon a different rule. The drawer or indorser of the bill is not discharged by the neglect of the holder to present the same for acceptance immediately or at any time before the time when it becomes due and payable. The reason of this is that the drawer, by fixing a day certain for payment, assumes the responsibility of providing funds at that time, whatever may have been his

previous credit with the drawee. Again, an indorser makes, as the phrase is, "a new bill on the same terms." Again, he waives his right of immediate acceptance by not enforcing it, by putting his bill into circulation without acceptance. If a bill, however, is actually presented for acceptance, and is dishonored before it becomes due, notice of such dishonor must be given both to the drawer and indorser without delay, or they will be discharged.

The owner has an interest in having it presented for acceptance without delay, although such presentment is not necessary in the case of a bill payable on a day certain, to enable him to retain his claim against the drawer or indorsers of such bill. The right to require an acceptance is one which the holder of the bill may use or not, as he thinks proper, but it is certainly an advantage to him to demand such acceptance; for, if the drawer is in credit, the drawee will probably accept, and the holder will thus obtain an additional security for his debt. Whereas, if he delays to present the bill for acceptance until it becomes due, and the drawer fails in the mean time, the drawee may then refuse to accept.<sup>7</sup>

The question of a reasonable time is as yet an unsettled one. It has been the subject of some discussion in the courts. By the United States courts it is deemed a question of fact, and the province of the jury to decide; by the New York courts, one of law, for the court to decide.<sup>8</sup> The better opinion would seem to be that it is a question for neither the jury nor the court to decide wholly, and yet a question in whose determination both the jury and the court must take part. "What is a reasonable time," said Judge Byles,<sup>9</sup> "depends on the circumstances of each par-

<sup>7</sup> *Allen v. Suydam*, 17 Wend. 368, 20 Wend. 320.

<sup>8</sup> *Aymar v. Beers*, 7 Cow. 707; *Edw. Bills & N.* §§ 539-546.

<sup>9</sup> *Wood's Byles*, Bills, p. 183.



ticular case, and is a mixed question of law and fact, although reasonable time in general, and reasonable time for giving notice of dishonor in particular, is a question of law." In *Mullman v. D'Eguino*<sup>10</sup> Lord Chief Justice Eyre explains the meaning of this somewhat vague expression by saying that "what is a reasonable time must depend on the particular circumstances of the case; and it must always be for the jury to determine whether any laches is imputable to the plaintiff;" and the later cases have developed fully his meaning. That a reasonable time is a mixed question of law and fact means that the question is to be decided by the jury, under proper instructions from the court. It may vary much, according to the particular circumstances of each case. If the facts are doubtful or in dispute, it is the clear duty of the court to submit them to the jury; but, when they are clear and uncontradicted, then it is competent for the court to determine whether the time required by law for the presentment has been exceeded or not.<sup>11</sup>

### Who may Make Presentment—Protest.

**178.** The bill, if an inland bill, may be presented by the holder or his duly-authorized agent or representative. If a foreign bill, it is presented by a notary public.

Note—The foregoing section applies also in case of presentment for payment.

**179.** Possession of the instrument is *prima facie* evidence of title to it.

Note—The foregoing section applies also in case of presentment for payment.

<sup>10</sup> *Mullman v. D'Eguino*, 2 H. Bl. 565.

<sup>11</sup> *Prescott Bank v. Caverly*, 7 Gray, 217.

The meaning of the above rule perhaps may be made clearer by saying that it answers the question, who should be sent with a bill or note to present it either for acceptance or payment. The point is not where a presentment and demand should be made, or how it should be made, but who should make it. The answer to this depends upon whether the instrument is payable to bearer, indorsed in blank, or indorsed in full; for, both in case of presentment for acceptance and of presentment for payment, the rule is that the drawee in case of acceptance, and the person sought to be charged with liability in case of payment, is bound to consider the person in possession of the bill or note, with the ostensible legal title to it, as the person lawfully entitled to make the demand. In case of bills or notes payable to bearer or indorsed in blank, this ostensible legal title is shown by the possession of the instrument. Where, however, the instrument is unindorsed by the payee or indorsed in full, and not in the possession of the indorsee, then the person to whom it is presented is put upon his inquiry. If, without inquiry, he accepts and pays, it is at the risk of repayment, if he does not pay the true owner. He certainly cannot be deemed, as is sometimes said, to be the agent of the true owner by virtue of his possession.<sup>12</sup> Though this last position is modified by the rule that if it appears conclusively that the omission to indorse was through inadvertence, and that, although not indorsed, the instrument was transferred to the holder before maturity, for a valuable consideration, then such an instrument is in the possession of some party from whom it is proper to accept it, or to whom it is proper to pay it.<sup>13</sup>

The agent making the presentation is generally, but not

<sup>12</sup> *Doubleday v. Kress*, 50 N. Y. 413.

<sup>13</sup> *Franklin Bank v. Raymond*, 3 Wend. 69.

necessarily, a notary public. The student must carefully observe the distinction between presentment and protest, and also between the necessity of protest in the case of inland bills and promissory notes, on the one hand, and of foreign bills, on the other. Presentment and protest are different things. Presentment is placing the bill so that those liable upon it can have it at hand to accept it or to pay it when due. Protest is an official act, held necessary in case of foreign bills to charge the indorsers. Any person who is the lawful holder of the instrument may make a presentment. And while it is also true that any person, in the absence of a notary public, may make a protest, nevertheless the custom is practically limited to notaries public, because it is only the certificates or manifests of notaries public which by the statutes of the several states have been declared to be *prima facie* evidence of the facts contained in them. In the second place, inland bills and promissory notes are also to be sharply distinguished from foreign bills. The distinction is as follows:

(1) A foreign bill must be presented by a notary public, and his certificate is *prima facie* evidence of the facts contained in it.

(2) An inland bill or promissory note, whether inland or foreign, not being originally within the rules of the law merchant, is not subject to the operation of this rule. Statutes in most of the states have, however, sanctioned the practice of a notary public's presenting the paper by putting his certificate on the same footing with that of a notary public presenting a foreign bill of exchange.

By the general law merchant, no protest is required to be made upon the dishonor of any inland bill or promissory note, but it is exclusively confined to foreign bills of exchange. It is true, in case of inland bills and promissory notes, it is a common practice for a notary public to be employed to

make demand of payment of inland bills and promissory notes from the acceptors and makers, and also to give notice of the dishonor to the indorsers thereon. But this is a mere matter of convenience and arrangement between the holder and the notary, and is by no means a requisite imposed or recognized by law as binding upon the holder. Even after protest, it is no necessary part of the official duty of a notary to give notice to the indorsers of the dishonor of a promissory note, although certainly it is a very convenient and useful course in the transactions of such affairs in commercial cities. And, lastly, if a protest were necessary, it is equally clear that it is not indispensable in all cases that the same should be actually made by a person who is in fact a notary. In many cases, even with regard to foreign bills of exchange, the protest may, in the absence of a notary, be made by other functionaries and even by merchants.<sup>14</sup>

The reason for employing a notary in case of foreign bills is because, from the needs of the case, some act of a universally recognized authority is called for. By force of custom, the official act of the notary public is of recognized authority throughout the world. It is deemed to afford satisfactory evidence of dishonor to the drawer and indorsers, who from their residence abroad might experience a difficulty in making proper inquiries on the subject, and be compelled to rely on the representation of the holder. By the common law, also, in case of a foreign bill, a notary's protest is competent evidence of such fact, alike in cases of protests for non-acceptance or non-payment and for better security.<sup>15</sup> The usual practice in case of foreign bills is, when the notary does not himself present the bill, for the

<sup>14</sup>Burke v. McKay, 2 How. 66.

<sup>15</sup>Halliday v. McDougall, 20 Wend. 80.



holder to make his own presentment at first, and then, in case of a refusal, to place the paper in the hands of a notary public to make, in his turn, presentment and demand. If payment or acceptance is then refused, the notary protests the bill, and gives notice of its dishonor. In this connection it is proper to add the additional disconnected principles: That the states of the Union, as regards each other, are foreign states, and that, when it is sought to charge non-residents there, the intervention of a notary public is necessary;<sup>16</sup> that, by the rules of common law, the act of a notary public in protesting either an inland bill or a foreign or inland promissory note is deemed of no effect. But, generally, throughout the Union, the states have passed statutes sanctioning, in case of inland bills and promissory notes, the practice of demanding payment or acceptance and protest by a notary public, and making the certificate of protest evidence of the fact contained in it.

### Place of Presentment for Acceptance.

180. The presentment for acceptance, if the bill is not addressed to any particular place, should be made to the drawee personally either at his dwelling or place of business at the time of presentment. If addressed to the drawee at a particular place, presentment should be made at that place.

The text writers<sup>17</sup> make a distinction between bills and notes addressed to a particular place and those containing no address. In the first case, where it is desired to protest the bill for non-acceptance, the holder should take the bill

<sup>16</sup> *Commercial Bank v. Varnum*, 49 N. Y. 269.

<sup>17</sup> *Edw. Bills & N.* 557.

to the place of address, and present it there to the drawee personally, or to his authorized agent. If, however, the drawee has changed his place of business or place where he would usually accept paper, and cannot be found at the place of address, then some authorities say the law will not confine the presentment to the particular place of address, but enjoins upon the holder a reasonable degree of effort, such as making some inquiry and attempt to find him within the town which is the place of address. This, however, is much disputed. If there be no address, then the law requires a presentation at the drawee's place of business or residence. The presentation, in order to found a proper notice of dishonor, should be to the drawee personally, or to a properly authorized agent. The foregoing principles, it ought to be said, are not very clearly defined by the decisions of the courts, but they are probably the law.

### Hour of Presentment.

**181. Presentment for acceptance should be made during usual and reasonable hours.**

Note—The foregoing section applies also in case of presentment for payment.

With business men the legal meaning of "usual and reasonable hours" is any time during the proper hours of business. These, except where the paper is due from a bank, generally range through the whole day to bedtime, in the evening. There has been some attempt at a classification in later decisions, as follows:

(1) Presentment at a bank should be during banking hours.

(2) Presentment at a place of business, during the usual business hours.

(3) Presentment' at one's residence between the usual hours of rising and retiring.<sup>18</sup>

In addition to this general classification, there are other considerations, depending largely upon the circumstances of each particular case. The principal ones are the usage of trade, and the location of the domicile of the person to whom presentment was to be made. But the general principle underlying these considerations is that the person making the presentment should use due and proper diligence, and that the presentment should be made at such a time of day that the person expected to make the payment or give the acceptance, in the exercise of ordinary business prudence, cannot be supposed to have been taken off his guard or caught without funds. It is almost needless to add that presentment in improper hours, as a legal act, is a nullity.

### Effect of Non-Acceptance—Protest.

182. When a bill has been presented for acceptance and refused, no further demand of payment is, in general, necessary to charge the drawer and indorsers.

183. Where the drawee, upon presentment, refuses to accept a bill of exchange, the same proceedings to hold the drawer and indorsers must be taken by the holder that are taken by him in case of non-payment of a bill or note.

These two principles set forth the common rules relating to the effect of non-presentment and non-acceptance. Many of these effects are necessarily involved in the doctrines

<sup>18</sup> Salt Springs Bank v. Burton, 58 N. Y. 430.

of acceptance and presentment themselves; hence they have been already mentioned in speaking of acceptance and presentment for acceptance. To complete what has already been said, it is as well to mention a few further facts concerning protest, and to show the main exceptions to the operation of the general rule of giving notice of dishonor to parties. We have already pointed out that on the drawee's refusal to accept one of the conditions of the drawer's contract is broken, and a right of action accrues against him and all indorsers prior to the holder who presents the bill for acceptance. We have already shown that it is usual in such cases to protest bills or notes. Protest means the solemn declaration on the part of the holder of a bill or note against any loss to be suffered by him by reason of failure to accept or pay. It is usually made by a notary public in his own person.

The proceedings necessary to be taken in such a case are alike in cases of non-payment and non-acceptance. They are as follows:

- (1) Presentment of the instrument by the authorized person or notary to the proper parties, and demand of them for its payment.

- (2) If payment is refused, minutes by the notary on the instrument or his book of registry or both, his initials, the date, and the record of the refusal, and that of the notice.

- (3) The subsequent writing out of these facts, together with those of notice, in the form of a certificate under his seal.

The principal purpose and effect of the certificate or manifest is that it is presumptive evidence of the facts contained in the certificate. It is a great advantage to be able to produce the evidence in court, and have the notary's certificate proof of the many facts stated in it, all of which are necessary to consummating an indorser's



liability. The noting of the instrument is for the notary's private benefit, and to enable him to keep a record of his proceedings.

### Effect of Non-Presentment.

184. Where it is incumbent to present a bill for acceptance, a failure to make due presentment deprives the holder both of his remedy on the bill itself, and on the consideration for which it was given.

Note—The foregoing section applies also in case of presentment for payment.

Questions under this rule generally arise where negotiable paper is exchanged either as collateral to or for and in consideration of some indebtedness incurred by its owner, as, for example, upon a sale of goods. In such a transaction the party receiving the paper stands in all things in the shoes of him from whom he takes it. To speak very loosely, we may say that the taker of the paper has exchanged whatever rights and duties he had in old property for the rights and duties vested in the negotiable instrument. Where bills are received in payment of goods, the duty of presenting the bill results from the nature of the instrument accepted in payment. This instrument purports to be a transfer of funds which the drawer has in the hands of the drawee. In receiving the paper, there is implied by law an undertaking on the part of the holder that he will take the proper steps to have those funds applied to the satisfaction of the debt. He is therefore bound to present the bills for payment, and give notice if they are not paid, and the burden lies on him of proving that due diligence has been used. The transferrer of the bill has the right to presume that the bills will be presented, and, if he

received no notice of their dishonor, he naturally concludes that his funds in the hands of the drawee have been applied in satisfaction of his debt; and it lies on the person who holds the bills and whose duty it is to act on them to show that this has been done.<sup>19</sup> Thus, the rule that a creditor may so deal with negotiable securities received from his debtor as to discharge the debtor from all liability, whether the securities are in fact paid or not, is right in principle. Its reason is that the creditor makes these securities his own. He substituted the parties to them as his debtors in place of his original debtor by his neglect or laches, from which loss and injury to the original debtor has ensued. In receiving the securities, the creditor has undertaken to do all that the law requires to be done, and, failing in the performance of that duty, the debtor is discharged. Laches which discharges the drawer or indorser of a bill of exchange effectually extinguishes the debt for the payment of which a bill is transferred. If, by the acts or omission of the creditor, a loss occurs, it should fall on him who is the cause of the loss, rather than upon the distant and innocent debtor.

### Notice of Non-Acceptance.

185. In many jurisdictions failure to give the drawer and indorsers proper notice of the non-acceptance of a bill drawn in good faith *prima facie* discharges them.

186. Where no loss of damage has been or could be sustained by the drawer or indorsers by reason of lack of the notice to them, the holder may show that fact in excuse of his failure to give notice.

<sup>19</sup>Dayton v. Trull, 23 Wend. 345; Smith v. Miller, 43 N. Y. 171; People v. Cromwell, 7 N. E. Rep. 413, s. c. 102 N. Y. 477.

The reason of the rule that a failure to give the drawer and indorsers notice of non-acceptances discharges them is that the notice is required, so that these parties may take prompt measures of self-protection; the drawer by withdrawing or withholding the further accumulation of effects in the hands of the drawee, and the indorsers by obtaining payment from the parties respectively liable to them.<sup>20</sup> When, however, the non-acceptance, non-payment, or failure to give notice to the drawer or to the indorser cannot possibly be to the injury of the latter, because the reason for the rule has failed, the rule itself will not apply.

### Place of Presentment for Payment.

187. It is not necessary that a presentment for payment should be personal. It is sufficient if made at the place specified in the instrument, or, if none is specified, at the place of business or residence of the maker or acceptor.

188. It is the duty of the maker or acceptor to have funds at the places specified to meet the instrument when due.

189. A personal demand, however, will probably be sufficient, though made elsewhere than at the place specified in the instrument for its payment, if there is no objection made at such time to the demand being made elsewhere than at such place.

The place of demand depends somewhat upon the terms of the instrument, and whether those terms specify a place of payment or not; somewhat upon the accessibility of the

<sup>20</sup> Stewart v. Millard, 7 Lans. 373.



parties; somewhat upon such incidents to the bill or note as specific agreements made between the parties at the time of the origin of the instrument. And all of these questions are tested by, and as a theory are rooted in, the fundamental question whether diligence has been exercised in the presentation of the instrument, such that in equity and fairness the indorsers may properly be charged.

When a bill or note is not made payable at any particular place, the general rule of law is that, in order to charge the indorser, payment must be demanded of the maker personally, or, if not personally, at his dwelling place or other place of abode, or at his place of business.<sup>21</sup> This is a rule which can be acted upon in the majority of instances, because a presentment can be made at one of these places. But the rule is not without exception. Under various circumstances, a demand in any form may be dispensed with. The test is whether due diligence to make a demand has been made, and if a demand is found to be impracticable, proper efforts for that purpose having been made, the indorser will still be liable, notice having been given him by the holder. Instances of this exception are when the maker has absconded, or is a seaman on a voyage, or has no known place of residence or of business, or after the giving of the note or bill, and before its maturity, the maker or acceptor has removed from the state or country. In all of these instances a presentment and demand are excused. It is to be emphasized that the reason of the rule is due diligence; and, where no place of payment is stipulated in the note, due diligence means what is consistent with ordinary business practice. Experience warrants the position that ordinary business practice and due diligence are the same. Where no place of presentation or payment is specified, due

<sup>21</sup> Taylor v. Snyder, 3 Denio, 145; Holtz v. Boppe, 37 N. Y. 634; Gates v. Beecher, 60 N. Y. 518.



diligence would require that the instrument be presented where there might be supposed to be some one to care for it.<sup>22</sup> Hence business practice and rules of the law merchant prescribe, in cases of instruments where no place of payment is specified, that if the presentment is made in business hours, and the maker or acceptor has a regular place of business and an office, demand should be made there to charge the indorser; otherwise, the demand should be made at his residence.

But a personal demand is not often necessary as a condition precedent to fix the liability of the drawer and indorsers. It is commonly the case that there is an agreement, express or implied, that the instrument should be paid at some place.<sup>23</sup> By the law merchant, it is not necessary that a demand should be personal; it is sufficient if it be made at the house of the maker or acceptor. It is the same thing, in effect, if it be made at the place where he appoints it to be made.<sup>24</sup> The general rule is that a demand must be made on the maker of the note on the day it falls due. The modification of this rule is that, when the paper is payable at a particular place, such demand need not be made if the holder or any one for him is at the place with the paper, so that he may receive the money.<sup>25</sup> The mere presence of the instrument at the place of payment on the day of payment is enough.<sup>26</sup> By reason of the stipulation he makes, it is the duty of the acceptor or maker to have funds at that particular place to take up the bill or

<sup>22</sup> *Woodworth v. Bank of America*, 19 Johns. 391; *Meyer v. Hibsher*, 47 N. Y. 265.

<sup>23</sup> *Saunderson v. Judge*, 2 H. Bl. 509.

<sup>24</sup> *Nichols v. Goldsmith*, 7 Wend. 162.

<sup>25</sup> *Woodin v. Foster*, 16 Barb. 146.

<sup>26</sup> *Gillett v. Averill*, 5 Denio, 85; *Bank of Syracuse v. Hollister*, 17 N. Y. 46; *Merchants' Bank v. Elderkin*, 25 N. Y. 178.

note. The cases are very strict in compelling the holder to carry out the stipulation embodied in the instrument where by its terms it is agreed to be paid at a particular place. The reason for this is<sup>27</sup> that the demand at the place indicated is a condition precedent to the right of recovery against an indorser. He contracts only to be answerable in default of the maker after demand has been made in strict compliance with the terms of the contract, and after due notice of default. Being in the character of a surety, his obligation is *strictissima juris*.

A modification of this rule is to be noted. It is that, if payment is to be made at any one of several places, presentment may also be made at any one of them. This modification is because the aim of the theory of negotiability is to put the least possible burden upon the holder. This stipulation is for his benefit. Therefore the maker or acceptor, who is party to such a stipulation, must be ready to pay the instrument at any and all of the places named as places of payment in it. There is one further point which is in doubt. It cannot be positively stated that, where an instrument is made payable at a particular place, a demand made elsewhere than at that place would be sufficient. In *King v. Holmes*<sup>28</sup> it was held that where the notary was on his way to the acceptor's place of business, and met him on the street, and the acceptor declined to pay the draft, the right of demand at that particular place was waived. But it would seem doubtful, when the rights of indorsers had intervened, that the doctrine quoted in the text would be the law.

We give, in conclusion to this much-discussed subject of the place of presentment for payment, a summary of the common rules. It is:

<sup>27</sup> *Ferner v. Williams*, 37 Barb. 9.

<sup>28</sup> *King v. Holmes*, 11 Pa. St. 453.

(1) If the instrument is to be paid at a city merely, anywhere in that city.

(2) If in the foregoing subsection the person from whom payment is expected has his home and office in the same city, presentment may be made at either his home or office.

(3) If the instrument is to be paid at a special street address, as "No. 10 Main St., Buffalo, N. Y.," at No. 10 Main St.

(4) If there is no place of business or it is abandoned, at the maker's house.

(5) Where the instrument is made payable at either of several places, presentment at any of those places is sufficient.

#### Time of Presentment for Payment.

190. Presentment for payment to be of any effect, must be made only at the time when the note is due. Presentment either before or after is a nullity. A bill or note properly presented for payment must be paid forthwith.

#### Effect of Non-Presentment for Payment.

191. Failure of holder to present a bill for payment at the proper place and time—

(a) Relieves the acceptor or maker from payment of interest and costs of suit, if they were ready with funds to meet the bill at the time and place of payment, but not from the principal sum of the note.

(b) It discharges the drawer and indorsers from liability.

The foregoing are the main principles in reference to the time of presentment of a bill or note. They involve

questions of the days of grace, and how they operate in extension of the time of payment stipulated in the instrument, and what the different effects are of failing to present the instrument, as regards the acceptor and maker, on the one hand, and the indorsers, on the other.

Lord Holt, in 1701, in *Tassell v. Lewis*,<sup>29</sup> thus expounds the law merchant: "In case of foreign bills of exchange, the custom is that three days are allowed for the payment; and, if they are not paid upon the last of the three days, the party ought immediately to protest the bill and return it, and by this means the drawer will be charged. But, if he does not protest it on the last of the three days, which are called the 'days of grace,' then, although he upon whom the bill is drawn fails, the drawer will not be chargeable, for it shall be reckoned his folly that he did not protest. But if it happens that the last day of the said three days is a Sunday or a great holiday, as Christmas day, upon which no money used to be paid, then the party ought to demand the money upon the second day; and, if it be not paid, he ought to protest the bill the second day; otherwise, it will be at his own peril, for the drawer will not be chargeable." This doctrine, thus declared to be the law merchant, has been largely followed by courts of this country, and is probably the common law, except when it is modified by statute. Aside from this fact of extending the time of payment, there are few respects in which the time of presentment for payment differs from that of presentment for acceptance. A summary of the common-law rules, which perhaps it will be worth while for the student to remember, is as follows:

(1) Paper entitled to grace must be presented on the last day of grace, unless that day is a holiday, in which event

<sup>29</sup> *Tassell v. Lewis*, 1 *Ld. Raym.* 743.



presentment must be made on the next preceding business day.

(2) Paper not entitled to grace which falls due on a holiday must be presented on the next succeeding business day.

(3) If made payable at a bank, during banking hours; but, if after hours, presentment would be sufficient if there were no funds during banking hours.

(4) If not payable at a bank, at any reasonable hour up to the "hours of rest;" after this time, unavailing.

(5) If made payable at a business place, during what are known as "business hours."

(6) Where no time is fixed, within a reasonable time, (probably a mixed question of law and fact.)

The reasons for the rules and the rules themselves are much the same in case of both the time and place of presentment. In fact, it may be said that in general, knowing one, the other is known. There is one rule not yet adverted to which applies to both the time and place of presentment which needs further comment. It is the difference in position between the acceptor and maker, on the one hand, and that of the indorsers, on the other, in regard to the time and place of presentment. As far as the maker and acceptor are concerned,—and in this regard they are considered as holding the same position,—the place of payment embodied in an instrument is looked upon merely as a memorandum of the place where payment is to be demanded, and not as a part of the contract. The maker or acceptor is liable everywhere, and, as against him, the bringing of the action is a sufficient demand. The right of action always subsists so long as the instrument is unpaid. The place of payment, however, is so far important that, if the maker or acceptor were there with his money to pay the instrument, it is looked upon much as a tender would be in the case of an ordinary debt. The holder may

recover from him at any time the amount of the instrument, but not interest, by way of damages, for his failure to pay it. In other words, the non-attendance of the holder with the instrument at the time and place of payment can produce no worse consequences to him than if he had attended, and the acceptor or maker had also been present, and tendered the money, which the holder had refused to accept. Of course, with this must be coupled the other principle governing the law of tender,—that, for the maker or acceptor to preserve his rights, the tender must be kept good. The funds must be kept at the place of payment to pay the instrument at any time; for if the holder make a special demand afterwards, and the instrument be not paid, then his rights revive, and he becomes entitled to interest or damages from the time of the demand and also his costs of suit. This rule does not apply to the drawer or indorser. He is not the principal debtor, but only a surety, whose liability is dependent upon the strict performance of the contract by the holder.<sup>30</sup> The place and time of payment for him are an essential part of the contract. The indorser is entitled to be at once apprised of the default of the maker, so that he may protect himself, both from the payment of interest as damages and of costs, by taking up the note himself, and further may take steps to protect himself as against prior indorsers. The holder of the note is held to a most strict compliance with its terms. Presentment either the day before or the day after the instrument became due will not avail. The loss or want of one day is<sup>31</sup> a palpable want of due diligence, which discharges the indorser.

<sup>30</sup> *Wolcott v. Van Santvoord*, 17 Johns. 247; *Parker v. Stroud*, 98 N. Y. 379.

<sup>31</sup> *Johnson v. Haight*, 13 Johns. 470.

### Definition of Notice of Dishonor.

**192. NOTICE OF DISHONOR**—Is bringing, either verbally or by writing, to the knowledge of the drawer or the indorser of an instrument, the fact that a specified negotiable instrument, upon proper proceedings taken, has not been accepted, or has not been paid, and that the party notified is expected to pay it.

The doctrine of notice relates exclusively to negotiable instruments, and is important, in that its proper performance is a condition precedent necessary to fix the liability of the drawer and indorser. As has been said, the maker and acceptor is liable on the principal instrument, and notice to him is not necessary, because he was bound to pay the instrument when it was due. But the indorser's or drawer's contract is collateral, and in the nature of a guaranty; and the condition that the law merchant affixes to the contract is that such drawer or indorser shall have due and proper notice. The object of notice is to inform the party to whom it is sent (1) that payment has been refused by the maker; (2) that he is considered liable; and (3) that payment is expected of him. The important question, then, is to determine what is due and proper notice. The notice may be either in writing or verbal. That a verbal notice is proper seems settled both in New York and elsewhere.<sup>32</sup> No precise form of words is necessary; but, whatever form of words be used, they must convey legal notice to the party. In this all the text writers draw a distinction between notice of dishonor and knowledge of dishonor. Throughout the

<sup>32</sup> *Cuyler v. Stevens*, 4 Wend. 566; *Woodin v. Foster*, 16 Barb. 146.

text-books and the cases the statement is common to them all "that knowledge of the dishonor of a bill is not equivalent to notice of it."<sup>33</sup> The nature of the knowledge which is equivalent to notice is that, in order to make a prior holder responsible, he must derive, from some person entitled to call for payment, information that the bill has been dishonored, and that the party is in a condition to sue him, from which he may infer that he will be held responsible. In other words, the receipt of information by an indorser that an instrument is unpaid is not sufficient to fix his liability. There must be coupled with this information, derived from some competent person, that he, the indorser, is looked to for its payment.

### Elements of Notice.

**193. The elements of a sufficient notice are:**

- (a) **An identification of the instrument.**
- (b) **A statement of its proper presentment and demand for acceptance or for payment.**
- (c) **A statement of its non-acceptance or non-payment.**
- (d) **That the holder expects the party notified to pay.**
- (e) **That the notification be signed by the sender.**

Judge Story<sup>34</sup> states that the notice should either expressly or by just and natural implication contain in substance these matters:

- (1) A true description of the paper, so as to ascertain its identity.

<sup>33</sup> *Caunt v. Thompson*, 7 C. B. 400.

<sup>34</sup> Story, *Prom. Notes*, § 348.



(2) An assertion that it has been duly presented at maturity and dishonored.

(3) That the holder or other person giving the notice looks to the person to whom the notice is given for reimbursement and indemnity.

And the New York court of appeals, in *Artisans' Bank v. Backus*,<sup>35</sup> states that the essential facts needful to be communicated to the indorser to bind him are:

(1) That the note has not been paid at maturity.

(2) That it had been protested for non-payment.

(3) An identification of the note thus unpaid and protested.

The first question to be determined, then, is, what is a sufficient identification of the instrument?

### Description of Instrument in Notice.

**194.** The common form of identification is to describe the instrument by date, amount, parties, and state where it is awaiting payment; but any identification which, as a matter of fact, would indicate unmistakably to a business man of ordinary experience what instrument is to be paid, is sufficient.

This rule does not insist upon strict technical accuracy. Its object is to enable the indorser notified to protect himself by fixing the liability of others responsible to him by giving them notice in turn, and, further, that the indorser notified may know exactly what liability he has incurred by the default. Keeping this purpose in mind, the inquiry of the court is, has he been apprised of these facts? A notice which is barely enough to put the indorser

<sup>35</sup> *Artisans' Bank v. Backus*, 36 N. Y. 100.

upon his inquiry is not sufficient.<sup>36</sup> The notice must explicitly state what the note is, and must not be calculated in any way to mislead the party to whom it may be given. The notice must not misdescribe the instrument, so that the defendant may perhaps be led to confound it with some other. The description of the note should be sufficiently definite to enable the indorser to know to what instrument in particular the notice applies; for an indorser may have indorsed many notes of different dates, sums, and times of payment, and payable to different persons, so that he may be ignorant, unless the description in the notice is special, to which it properly applies or which it designates.<sup>37</sup> Thus, where the name of the maker was left blank, Judge Denio said: "The date, amount, and time of payment, and the statement that the party served with a notice was an indorser, might or might not recall it to his recollection. One indorsing for the accommodation of different persons, and keeping no bill book, would not, by means of such a notice, ordinarily be able to identify the paper on which he was sought to be charged; nor would one who indorsed and negotiated his own business paper, if his transactions of that kind were extensive, be much more likely to know what particular paper had been dishonored." The courts, however, have the power to go, and sometimes will go, beyond the mere notice itself. In determining whether the description of the note or bill is sufficient, the circumstances of the case and the indorser's knowledge of these circumstances are taken into consideration. A notice which omits an essential feature of the indorsement or misdescribes it is an imperfect one, but is not necessarily invalid. It is invalid only when it fails to give that information which

<sup>36</sup> *Remer v. Downer*, 23 Wend. 626.

<sup>37</sup> *Cook v. Litchfield*, 9 N. Y. 279; *Home Ins. Co. v. Green*, 19 N. Y. 519.

it would have given but for its particular imperfection; and even in case the notice in itself be defective, if, from the evidence of the attendant circumstances, it is apparent that the indorser was not deceived or misled as to the identity of the note, he will be charged. It thus becomes a question of fact, from the contents of the notice itself and the extrinsic facts admitted in the case, whether knowledge was actually brought home to the indorser of the dishonor of the note in suit.<sup>38</sup> This last position is only a modification of the general rule. It is only to be understood as applying where there is doubt whether the indorser understood what particular instrument was dishonored. When there is no dispute as to the facts, the sufficiency of the notice is a question of law for the sole interpretation of the court.<sup>39</sup>

#### Statement of Presentment, Demand, etc., in Notice.

195. If the statement of the necessary facts of presentment, demand, and non-payment appears by reasonable intendment, provided it appears in a way not to be mistaken, it is sufficient.

When there can be no doubt in the mind of the indorser about the bill or note which is unpaid, and the facts are undisputed, then the further question whether the notice contained a statement sufficient to comply with the rules of the law merchant is a question of law and of construction peculiarly the province of the court.<sup>40</sup> The contract of the indorser with and in favor of the indorsee and every subsequent holder to whom the instrument is transferred is that

<sup>38</sup>Hodges v. Shuler, 22 N. Y. 114.

<sup>39</sup>Cayuga Co. Bank v. Warden, 6 N. Y. 19; Dole v. Gold, 5 Barb. 494.

<sup>40</sup>Dole v. Gold, 5 Barb. 490.

if, when duly presented, the instrument is not paid by the maker or acceptor, the indorser will, upon due and reasonable notice given to him of the dishonor, pay the same to the indorsee or holder. The terms of this contract impose upon the indorsee or holder an obligation to make an attempt to obtain payment from the maker, and to give notice of such attempt and failure to the indorser; and the performance of this obligation is a condition precedent to the right of the holder to resort to the indorser for the payment of the note. Until the performance of this obligation on the part of the holder, the indorser's liability is contingent. Upon the performance of it, it becomes absolute. The statement that the note has been duly presented and dishonored is essential to establish the claim or right of the holder or other party giving notice, for otherwise he will not be entitled to any payment from the indorser. It will be sufficient, indeed, if the notice sent, necessarily or even fairly, implies by its terms that there has been a due presentment and dishonor at the maturity of the note, but mere notice of the fact that the note has not been paid affords no proof whatever that it has not been paid in due season, or even that it has been presented at all. And if there be no statement of the dishonor of the note, nor anything from which it can be fairly implied that due presentment has been made, the notice is fatally defective. Whatever will show dishonor is sufficient. This prescribes no particular form of notice. It simply requires the holder, in such language as he may adopt, to inform the indorser that the maker has neglected to pay the note; that the contingency on which the indorser's promise to pay depended has happened; and that his liability has become absolute.

The express statement of the facts of presentment, demand, and non-acceptance or non-payment, in themselves,



is perhaps rather technical than necessary. The point is to convey to the indorser full information of the fact that paper otherwise identified in the notice has been dishonored. This may be done by express terms or by necessary implication.<sup>41</sup> The term "necessary implication" gives or is construed to mean a wide latitude as to terms. "I should myself doubt," says Parke, B.,<sup>42</sup> "whether we could go so far as to say that it ought to appear upon the face of the notice, 'by express terms or necessary implication,' that the bill was presented or dishonored. It seems to me enough if it appear by reasonable intendment, and would be inferred by any man of business, that the bill had been presented to the acceptor, and not paid by him." And where no mercantile man, upon reading the notice, could possibly misunderstand its meaning, that is deemed within the meaning of reasonable intendment, and sufficient. There is also a distinction as to what constitutes sufficient notice of dishonor, depending upon whether the paper is made payable at a bank or other particular place, or made payable at large. If made payable at a bank or other particular place, it is the business of the maker or acceptor to have funds at that place when the paper becomes due. His failure to do so amounts to a dishonor, and it is sufficient to inform the indorser of this failure. No specific statement of demand and presentment is necessary. A statement to the indorser of non-payment, if it appears that the paper was at the bank at the time of its maturity, is sufficient, because such a statement can mean nothing else than the dishonor of the paper. On the other hand, if the paper is payable at large, a statement of presentment and demand is necessary, because a personal demand of

<sup>41</sup> *Solarte v. Palmer*, 1 Bing. N. C. 194.

<sup>42</sup> *Hedger v. Steavenson*, 2 Mees. & W. 799.

the maker is one prerequisite of dishonor.<sup>43</sup> Such expressions as "due and unpaid,"<sup>44</sup> "that the note remains unpaid,"<sup>45</sup> "notice of non-payment,"<sup>46</sup> have been held insufficient, because the fact alone that the acceptor or maker has not paid the instrument is immaterial to the liability of the indorser. The legal fact which fixes the indorser's liability is the demand of payment of the parties and the dishonor of the bill.<sup>47</sup> Terms which satisfy the requirements of reasonable intendment in meaning are the direct statement of the dishonor of the bill;<sup>48</sup> or that it has been protested for non-payment, or statements of that character.<sup>49</sup> The reason of this is that they include in themselves demand and all necessary acts to charge an indorser.

It is important to state in this connection that, while it is better practice to state that the party holding the bill looks to the person notified for payment, still this in itself is not indispensable. The reason is that this is implied in the very act of giving notice.<sup>50</sup> Notice that payment has been demanded of the maker or acceptor and refused by him is sufficient to charge the indorser;<sup>51</sup> and it

<sup>43</sup> *Dole v. Gold*, 5 Barb. 490.

<sup>44</sup> *Gilbert v. Dennis*, 3 Metc. (Mass.) 498.

<sup>45</sup> *Pinkham v. Macy*, 9 Metc. (Mass.) 174.

<sup>46</sup> *Townsend v. Lorain Bank*, 2 Ohio St. 355.

<sup>47</sup> *Hartley v. Case*, 4 Barn. & C. 339, 10 C. L. R. 606; *Boulton v. Welch*, 3 Bing. N. C. 688, 32 C. L. R. 283; *Strange v. Price*, 10 Adol. & El. 125, 37 C. L. R. 88; *Furze v. Sharwood*, 2 Adol. & El. (N. S.) 388, 42 C. L. R. 726.

<sup>48</sup> *Stocken v. Collins*, 9 Car. & P. 653, 38 E. C. L. 380; *Woodthorpe v. Lawes*, 2 Mees. & W. 109.

<sup>49</sup> *Mills v. Bank of U. S.*, 11 Wheat. 431; *Cayuga Co. Bank v. Warden*, 1 N. Y. 413.

<sup>50</sup> *Cowles v. Harts*, 3 Conn. 517; *Shrieve v. Duckham*, 1 Litt. (Ky.) 194; *Warren v. Gilman*, 17 Me. 360.

<sup>51</sup> *Fitchburg Ins. Co. v. Davis*, 121 Mass. 121; *Bank of U. S. v. Carneal*, 2 Pet. 543.

certainly cannot be argued that it is necessary to state what the law itself implies,—that the indorser is to be looked to to pay the instrument if the acceptor or maker does not pay it.<sup>52</sup>

### By and to Whom Notice Given.

**196.** Notice must be given by the holder of the instrument, or by any person upon whom a liability upon the instrument is fixed, to any person upon whom it is sought to fix a liability upon the instrument.

Note—It is the safer practice to notify all indorsers, *e. g.* indorsers for collection; accommodation drawer or indorser; indorsers of bills or notes payable on demand; each partner, as well as the firm, by name; each of the joint indorsers; persons representative, if any; if none, then some authorized person at the family residence; the bankrupt personally; and to the assignee of the bankrupt.

**197.** Notice by a stranger to the instrument is insufficient, except it be the duly-authorized agent or the representative of a party.

The signature of the notice must be by some person authorized to give it. It is not absolutely necessary that the notice should come from the holder of the bill, but it may be given by any person who is a party to it, and who would, on the same being returned to him, have a right of action on the bill. A notice by a mere stranger is not sufficient.<sup>53</sup> An agent of the holder may give notice, be-

<sup>52</sup> *Furze v. Sharwood*, 2 Gale & D. 116, 2 Q. B. 416, 42 E. C. L. 726; *Miers v. Brown*, 11 Mees. & W. 372; *King v. Bickley*, 2 Q. B. 419.

<sup>53</sup> *Chanoine v. Fowler*, 3 Wend. 173; *Sewall v. Russell*, Id. 276; *Lawrence v. Miller*, 16 N. Y. 235.

cause, in doing so, he represents and acts on behalf of his principal; and that, too, although he may be a notary, and act in his official character. An attorney is such an agent;<sup>54</sup> and so, also, a collecting bank is an agent for transmitting notices,<sup>55</sup> or, more accurately speaking, is a principal for the purpose of transmitting notice of protest, and the notary who protests its paper is, in turn, its agent.<sup>56</sup> But with the exception of the agent, who is in law the same as the principal, the notice must emanate from some person who is a party to the bill. It is not essential that notice should be given by the holder,<sup>57</sup> because, if the holder only could give notice, then he might secure his own rights against his immediate indorser, but the latter and every other party to the bill would be deprived of all remedy against the anterior indorsers and drawers, unless each of these parties should in succession take up the bill immediately on receiving notice of dishonor,—a highly unreasonable position.<sup>58</sup> By a party to a bill, so far as relates to the person who gives or is given notice, is meant some person upon whom a liability is fixed, or one who, on the paper being returned to him when he pays it, will be entitled to reimbursement from some prior party. The liability of the party must be fixed before he is competent to give notice; and the test between the party to the bill, in the sense we have given it, and the stranger to the bill, is whether the party giving or given the notice would be liable upon the instrument.<sup>59</sup> The reason for this rule is

<sup>54</sup> *Firth v. Thrush*, 8 Barn. & C. 387.

<sup>55</sup> *Bank of U. S. v. Davis*, 2 Hill, 451.

<sup>56</sup> *Howard v. Ives*, 1 Hill, 263.

<sup>57</sup> *Tindal v. Brown*, 1 Term R. 167; *Chapman v. Keane*, 3 Adol. & El. 193.

<sup>58</sup> *West River Bank v. Taylor*, 34 N. Y. 128.

<sup>59</sup> *Harrison v. Ruscoe*, 15 Mees. & W. 231.



that, unless this liability is fixed, there can be no inference that the person giving the notice looks to the party to whom it is addressed for payment; whereas, on the contrary, when the liability is fixed, and the holder gives the notice, it must mean, if it means anything, that he looks to the party notified for payment.<sup>60</sup> There is another reason sometimes given, namely, that the law will not permit the impertinent intermeddling of a third person to have the effect in law of converting the conditional liability of the indorser into an absolute one; and whether or not this is the speculation of a legal theorist, rather than the weighty utterance of a judge of a court of last resort, it is certain that notice of dishonor given by a stranger is rather that kind of information which, when received by an indorser, invests him only with knowledge of the dishonor, without the effect and liability attached to notice of dishonor.

The rule we have just given excludes more than the person who is in no wise a party to the instrument. It excludes one who has been a party to the instrument and liable thereon, but whose liability is discharged. "The mischief would happen," says Parke, B.,<sup>61</sup> "that there might be a bill with twenty indorsements which the holder might retain twenty days after its dishonor, and then recover against the drawer, on a notice then given to him by the first indorsee, which that indorsee could not do. Such a notice would be in good time if given by the first indorsee, and would therefore be bad and not support an action by the last. The rule excludes the case of notice by an acceptor who never could sue himself upon the bill after taking it up." So it is a somewhat questionable rule of law that

<sup>60</sup> East v. Smith, 4 Dowl. & L. 744.

<sup>61</sup> Harrison v. Ruscoe, 15 Mees. & W. 231.

a notice given by the first indorser to the drawer of a bill is not available as between the second indorser and the drawer where the first indorser has not been charged with notice,<sup>62</sup> because he himself was not obliged to take up the bill. And, in other cases which may arise, the test whether a notice is binding or not depends upon the question whether the person who gave it has had his own liability fixed upon the instrument. If he has become responsible upon the instrument, he is able to transmit his liability over to those liable to him; otherwise, not.

### **To Whose Benefit Notice Inures.**

**198.** Notice sent by the holder inures to the benefit of successive parties who are liable upon the instrument if shown to have been received; but it is doubtful without such proof.

**199.** An indorser on receiving notice must notify antecedent indorsers, in order to protect himself.

**200.** If each indorser notifies his antecedent party, it will avail the holder who has notified only his immediate indorser.

Notice sent to the holder accrues to the benefit of all preceding parties. The holder may be satisfied with giving notice to his immediate indorser; but, if he does give notice to all the indorsers, it will accrue to the benefit of each indorser.<sup>63</sup> This rule is the natural outgrowth of the rule that notice need not be given by the holder of a bill, but

<sup>62</sup> *Ex parte Barclay*, 7 Ves. 597.

<sup>63</sup> *Jameson v. Swinton*, 2 Taunt. 224; *Hilton v. Shepherd*, 6 East, 14, note; *Stafford v. Yates*, 18 Johns. 327; *Morgan v. Van Ingen*, 2 Johns. 204; *Spencer v. Ballou*, 18 N. Y. 327.

can be given by any party to the instrument. The holder may only seek to secure his rights against his immediate indorser by regular notice to him alone. In order, therefore, that the latter and every other party to the instrument may not be deprived of all remedy against anterior indorsers and the drawer, it is prudent in each party who receives a notice to give immediate notice to those parties against whom he may have the right to claim.<sup>64</sup> Whether there be few or many indorsers, the duty of each is the same. It is that notice should be transmitted from one indorser to another, in the usual order of their indorsements.<sup>65</sup> Thus, in *Morgan v. Woodworth*<sup>66</sup> it was held that the second indorser, on receiving notice of the dishonor of a note, is bound to give notice immediately to the first indorser; and, if he fails to give such notice as soon as he receives it from the holder, the preceding indorser is not liable to him. There is a proviso to the last statement, however, and that is that, in this method of charging indorsers and drawers by consecutive notices from one party to the next immediately preceding him, the former is never bound to forward notice on the very day upon which he receives it. He may wait until the next day to do so.<sup>67</sup> Each indorser has "his own day." He is required to use due diligence. He is not bound to abandon all other business the instant he receives notice, and set about giving notice to others; and, in turn, as notice is received by each indorser, it accrues

<sup>64</sup> Bayley, Bills, p. 256; *Chapman v. Keane*, 3 Adol. & El. 193.

<sup>65</sup> *Dobree v. Eastwood*, 3 Car. & P. 250; *Bank of Utica v. Smith*, 18 Johns. 230; *Mead v. Engs*, 5 Cow. 303; *West River Bank v. Taylor*, 34 N. Y. 128.

<sup>66</sup> *Morgan v. Woodworth*, 3 Johns. Cas. 89.

<sup>67</sup> *Howard v. Ives*, 1 Hill, 263; *Bray v. Hadwen*, 5 Maule & S. 68; *Eagle Bank v. Chapin*, 3 Pick. 180; *Bank of U. S. v. Davis*, 2 Hill, 451; *Hilton v. Shepherd*, 6 East, 14; *Rowe v. Tipper*, 20 Law & Eq. R. 220.

to the benefit of all subsequent parties. Thus, for example, if the holder notifies his immediate indorser, and he, in turn, notifies his immediate indorser, and so on, through the chain of indorsers, up to the second and first indorser, the first indorser cannot object that he has received no notice from the holder. The holder can avail himself of the notice given the first indorser by the second indorser. It is sufficient if the first indorser had notice from any subsequent holder of the note of the default of the maker, and that he would be looked to for payment.<sup>68</sup>

### Method of Giving Notice.

201. Between parties residing in the same town the indorser is entitled to personal notice, either verbally or in writing, or a written notice must be left at his dwelling place or place of business.

202. Where the residence and place of business of the person who sends, and those of the person to whom the notice is to be sent, are in different places, a notice properly addressed, deposited in the post office, is sufficient.

203. Written notice may be served in two ways:

- (a) By actual delivery.
- (b) By deposit in the post office.

The method of actually giving notice presents itself in two aspects. The first is whether the notice was given verbally or in writing. The second is whether the notice in writing was served personally or served by mail.

While the requisites and rules concerning verbal notices

<sup>68</sup>Stafford v. Yates, 18 Johns. 327; Spencer v. Ballou, 18 N. Y. 327.



are not clearly stated by the courts, it seems to be agreed that, where no statute intervenes, a verbal notice is sufficient.<sup>69</sup> It also seems to be enough if, from the conversations between the parties, it can be ascertained as a fact that the party against whom the liability is sought to be enforced well understood what instrument was referred to. It seems to be also the rule that the courts are less strict in construing a verbal notice than in construing a written one. This is because a verbal notice communicated to the indorser, and which calls forth a conversation about the instrument in question, is very different from a written notice sent to the indorser. The latter constitutes the only means which the party has to inform the indorser of the particular instrument intended by it. If it is misdescribed in a written notice, the indorser is wronged, because he is misled. With a verbal notice, however, he has full opportunity of informing himself fully of the liability sought to be enforced against him. It is almost needless to say that the verbal notice must be given to the indorser personally. Mere hearsay does not create a binding liability.<sup>70</sup>

We have already gone as far as possible into the formal essential requisites of a written notice. It remains only to speak of its methods of service. As appears from the principal text, they may be either personal or by mail. The starting point in the development of the doctrine of the service of notice of dishonor is that it must be served in such a way as to certainly reach the hand of the indorser; wherefore, in the first view of the courts, a personal service was necessary.<sup>71</sup> The impracticability of such a rule

<sup>69</sup> *Cuyler v. Stevens*, 4 Wend. 566; *Cayuga Co. Bank v. Warden*, 1 N. Y. 413; *Woodin v. Foster*, 16 Barb. 146; *Gilbert v. Dennis*, 3 Metc. (Mass.) 495.

<sup>70</sup> *Woodin v. Foster*, 16 Barb. 146.

<sup>71</sup> *Ireland v. Kip*, 10 Johns. 489, 11 Johns. 231.

in growing business communities became apparent, and it was modified into the form that the holder of a bill or note was bound to give personal notice, or to see that the notice reached the dwelling place of the indorser. But this rule, in its operation, was hardly more satisfactory than the other; and, at length, the position was finally developed into a form in which it long remained. This was that, where the party to be charged resides in the same place where the presentment or demand is made, the notice of dishonor of a bill or note must be served personally on the drawer or indorser, or be left at his dwelling place or place of business.<sup>72</sup> In case of crowded, and particularly in large, country towns, which often have more than one post office, or where, if they have but one, a portion of the inhabitants live so far from it that they usually receive their letters and papers through a neighboring office in another town, the operation of this last rule soon became inconvenient, if not impossible. In the exercise of a sound discretion, the courts therefore further relaxed the rule; and the present wise position of the courts is throughout most jurisdictions that notice may always be sent through the post office, wherever there is a regular communication by mail between the place of presentment or demand and the office where the person to be charged usually receives his letters and papers. This is true, whether the sender and the person to be charged live in the same or different places. In either case the notice may be sent by mail. But there is a distinction in some jurisdictions, which is a relic of the old theory that personal service is the only proper method of giving notice of dishonor. The distinction lies between the serv-

<sup>72</sup> *Smedes v. Utica Bank*, 20 Johns. 372; *Louisiana State Bank v. Rowel*, 6 Mart. (N. S.) 506; *Shepard v. Hall*, 1 Conn. 329; *Hartford Bank v. Stedman*, 3 Conn. 489; *Bank of Columbia v. Lawrence*, 1 Pet. 578; *Ransom v. Mack*, 2 Hill, 590.

ice of a notice made by mail on parties who reside in the same and in different places. In the latter case, if the notice be properly addressed, and deposited in the post office in due time. it is good, although never actually received; in the former case, the sender is bound to show that it was actually received within the proper time.<sup>73</sup> This modification, where it exists, will probably in time become obsolete, and the rule will soon prevail universally that service by depositing the notice in the post office, properly addressed, is sufficient. It is certainly the wiser position that it should not be required of the holder to see that the notice is brought home to the party. It is certainly better for commercial paper to lay down the rule that the holder may employ the usual and ordinary mode of conveyance for serving his notice. And, whether the notice reaches the party or not, it is wiser to say that, in posting it, the holder has done all that the law required of him.<sup>74</sup> But, despite these urgent reasons, the present weight of authority warrants only the following statement of the law as at present adopted:<sup>75</sup>

The proper methods of notice, where the residence and place of business of the person who sends and those of the person to whom the notice is sent are in the same place, are as follows:

- (1) Personal notice, whether verbal or written, is the safer method.
- (2) Service by depositing in the post office, properly ad-

<sup>73</sup> *Cabot Bank v. Warner*, 10 Allen, 522; *Edw. Bills & N.* p. 6, § 812.

<sup>74</sup> *Bank of Columbia v. Lawrence*, 1 Pet. 578.

<sup>75</sup> *Shelburne Bank v. Townsley*, 102 Mass. 177; *Shelton v. Carpenter*, 60 Ala. 201; *Manchester Bank v. Fellows*, 28 N. H. 302; *Warren v. Gilman*, 17 Me. 360; *Prideaux v. Criddle*, L. R. 4 Q. B. 455; *Hare v. Henty*, 10 C. B. (N. S.) 65.

dressed, is sufficient, if it can be shown that the party to be notified has received the notice.

(3) Where the residence of the person to be notified is within the circuit where the letter-carrier system is in force, a notice deposited in the post office on the day after that of non-payment by the maker or acceptor, or of notification received by an indorser, is sufficient.

(4) Particular methods prescribed by the statutes of the several states.

### Time of Giving Notice.

204. Notice of dishonor may be, and usually is, sent as soon as there is an unqualified refusal to accept the bill or pay the instrument, or by an indorser to those liable to him in turn, as soon as he has received notice of his own liability.

205. Each successive party who receives notice of dishonor is entitled to a full day to transmit it to antecedent parties upon whom that party intends to fix a liability.

206. Notice of dishonor must be sent as follows:

- (a) Before the expiration of the proper hours of the business day following the dishonor, or when the holder and parties to be notified reside in the same place.
- (b) When they reside in different places, and there is mail communication between them, notice must be deposited in the post office in time to go on the day after dishonor if such mailing can be made within convenient business hours; if not, in the first practicable mail thereafter.



Notice of dishonor cannot be given before actual dishonor of the instrument takes place. This is because the law merchant insists upon a legal presentment and an actual dishonor before it fixes the liability upon the indorser. Without these the notice of dishonor is a meaningless form. The fact that the bill is unpaid is immaterial. It must be dishonored before the indorser can be liable, and hence a prerequisite to the issuing of the notice are the legal formalities necessary to create a dishonor.<sup>76</sup> But, the dishonor being once fixed, the holder has a reasonable time to take steps to fix the liability of the parties responsible over to him upon the bill or note. The meaning of this term "reasonable time" has become established by universal usage. He may, it is true, give notice at once, but all that is required of him is reasonable diligence. Reasonable diligence is regulated by practical convenience and the usual course of business. Between parties living in the same place, the holder has until the expiration of the following business day to give notice. He may give it within banking hours at the bank, within business hours at the countinghouse or place of business, and within the hours of rest at the dwelling place. It is probably also the case that, when the mail is used as a means of conveyance, he must mail it so that it will be received the next day.<sup>77</sup>

Between parties living in different places, the notice must be put into the post office in time to go by the mail next succeeding the last day of grace, or the first possible or practicable mail after the default.<sup>78</sup> The rule at first re-

<sup>76</sup>*Nicholson v. Gouthit*, 2 H. Bl. 609; *Jackson v. Richards*, 2 Caines, 343.

<sup>77</sup>*Bank of Alexandria v. Swan*, 9 Pet. 33; *Hartford Bank v. Stedman*, 3 Conn. 489; *Jameson v. Swinton*, 2 Taunt. 224; *Dobree v. Eastwood*, 3 Car. & P. 250; *Walters v. Brown*, 15 Md. 285.

<sup>78</sup>*Tindal v. Brown*, 1 Term R. 167; *Darbishire v. Parker*, 6 East. 3; *Lenox v. Roberts*, 2 Wheat. 373.

quired that notice of the default of the maker or acceptor should be put into the post office early enough to be sent by the mail of the day next succeeding the last day of grace. But it often happened that the mail of the day succeeding the day of default went out at unreasonable hours, or before a reasonable time could be had for depositing the notice, as, for example, soon after midnight, or at a very early hour in the morning, and in such cases was sometimes made up and closed the evening preceding. In view of this, the rule universally adopted has been that the notice, in order to charge the indorser, must be deposited in the post office in time to be sent by mail of the day succeeding the day of the dishonor, providing the mail of that day be not closed at an unreasonably early hour, or before early and convenient business hours.<sup>79</sup>

In regard to indorsers, each party to a bill or note has the same time after notice to himself for giving notice to other parties beyond him that was allowed to the holder after default, and the time in regard to them is governed by the principles we have just stated.<sup>80</sup> This rule, however, has its limitations. If the holder of a bill of exchange or promissory note wishes to avail himself of a notice of dishonor given by him to a remote indorser, he must give it within the time within which he is by law required to

<sup>79</sup> Fullerton v. Bank of U. S., 1 Pet. 605-608; Eagle Bank v. Chapin, 3 Pick. 180; Talbot v. Clark, 8 Pick. 51; Carter v. Burley, 9 N. H. 559-570; Farmers' Bank of Maryland v. Duvall, 7 Gill & J. 79; Freeman's Bank v. Perkins, 18 Me. 292; Mead v. Engs, 5 Cow. 303; Sewall v. Russell, 3 Wend. 276; Brown v. Ferguson, 4 Leigh, 37; Dodge v. Bank of Kentucky, 2 A. K. Marsh. 610; Hickman v. Ryan, 5 Litt. 24; Hartford Bank v. Stedman, 3 Conn. 489; Brenzer v. Wightman, 7 Watts & S. 264.

<sup>80</sup> Sheldon v. Benham, 4 Hill, 129; Howard v. Ives, 1 Hill, 263; Lawson v. Farmers' Bank, 1 Ohio St. 206.

give it to his immediate indorser. And he cannot avail himself of his laches to gain another day. If he could, the consequence which has already been pointed out would follow, namely, that, if there were 20 indorsers, he would have 20 days within which to give notice to the first of them. The holder has his day to give notice to any party he may seek to charge, and each of the prior indorsers in turn has his day. Each has one day to give notice to all parties against whom he intends to enforce his remedy. The holder may avail himself of a notice duly given by any other party to a bill, but this notice must be given in due time by the party to the bill, by which is meant due time if he himself were serving.<sup>81</sup>

### Waiver of Presentment and Notice.

207. Both presentment of a bill or note and also notice of its dishonor may be waived.

208. Presentment of a bill or note for payment is not necessary:

- (a) As against the drawer when he has no reason through his own fault to expect that the bill will be paid.
- (b) As against all parties when, by such causes as accident, superior force, or disease, sickness, absence, or death of the maker, it was impossible, after using due diligence, to present it.
- (c) Where presentment has been waived, whether by express agreement embodied in the in-

<sup>81</sup> Rowe v. Tipper, 13 C. B. 249; Dobree v. Eastwood, 3 Car. & P. 250.

strument, or on a separate paper, or such waiver is implied in the acts of the parties.

- (d) Probably where the person against whom the bill is sought to be enforced has been secured against loss by the person principally liable on the instrument.

The foregoing are common instances among the many which the courts construe as a waiver of the right of presentment of an instrument or notice of its dishonor. They rest upon somewhat different reasons, which it is our purpose to explain.

Where the drawer, through his own fault, has no reason to expect the bill will be paid, it is unjust to cast upon the holder the duty of presentment and notice. These are steps taken to fix the drawer's liability, and need only be taken when the bill was given in good faith, and after proper provision for its payment had been made on the drawer's part. He has made a contract with the holder, one element of which was that the drawee would honor his bill when presented; and, if it can be shown that there could have been no reasonable expectation of this from the beginning, he can suffer no loss or injury from the failure of the holder to make a presentment to the drawee which he was bound to know would be fruitless if made. Notice of dishonor as to him would be an empty form, which the law will not require at the hands of the holder. If the act be tainted with fraud, he cannot, of course, come into court and claim a right to be protected from the results of his own fraud.

The instance most discussed is when the drawer makes a draft having neither funds nor reasonable expectation of funds in the hands of the drawee, or, in other words, where the bill is improvidently drawn. The reason of the rule that



the drawer is not entitled to notice clearly would not apply where the drawee, though he had no funds of the drawer in his hands, had promised to accept the bill for the drawer's accommodation; nor would it apply where the drawer had consigned property to the drawee which he drew against, nor where there is a running account between him and the drawer, nor in any case where he had reason to expect his draft would be honored. The mere fact of his just expectation that the draft would be honored would take the case from the class of which we are speaking. In fact, this is the test to be applied: The question to be asked is whether the drawer had a legal right to expect or require that the drawee would honor his bill. If the courts can construe such a legal right or expectation on his part, failure to present the bill, and give him notice of its dishonor, discharged him. On the other hand, where the drawer withdraws his funds from the the drawee's hands, or directs him not to accept the bill, or, having drawn the bill, does some act which he knows will cause the drawee to refuse to accept, he has lost his right to insist on presentment and notice as conditions precedent to the enforcement of his liability.

The second class of instances, such as war, disease, the suspension of commercial intercourse by superior force, such as the public and positive prohibition of commerce, occupation of a country by public enemies, and the like, also exonerate the holder from presentment and notice. The interest of the public forbids such acts, and therefore the individual cannot be held responsible if he fail to perform them. The public policy also forbids communication with districts infected by such plagues as the cholera or yellow fever. Public safety requires quarantine of these, and hence, even if the matter be not regulated by express statute, as it is in some states, the doctrines of the common

law forbid all business intercourse with their inhabitants. It is true that the strict rule of the common law is that an inability to perform the terms or conditions of a contract by reason of inevitable accident or casualty constitutes generally no excuse for their non-performance. But this rule does not apply to the presentment of negotiable instruments. With negotiable instruments, as we have shown, the questions of presentment depend upon whether due diligence has been used, and the holder, if he has used such diligence in presenting the bill, and in notifying parties of its dishonor, has done all the law requires of him. Hence, in cases of inevitable or unavoidable accident, not attributable to the fault of the holder, want of presentment or notice is excused, provided there is a presentment and notice by the holder as soon afterwards as he is able to bring it about. The reasonable diligence on the part of the holder is measured by the general convenience of the commercial world, and the practicability of accomplishing the end required by ordinary skill, caution, and effort.<sup>82</sup> The rule of impossibility of performance in all the cases of war, plague, and inevitable accident alike rests upon the reason of due diligence, and hence alike in all these cases where the impossibility is not permanent the rule ceases to operate as soon as the impediment is removed. And the limitation to the rule is that demand and notice must be made and given within a reasonable time after the impediment is removed. Another limitation to the rule is that it does not apply either to maker or acceptors or indorsers, unless the objection applies to them. For example, where a maker or acceptor is in a beleaguered town, and so inaccessible, it is merely the mailing the presentation to him which is

<sup>82</sup> *Windham Bank v. Norton*, 22 Conn. 213; *Patience v. Townley*, 2 J. P. Smith, (Eng.) 223; *Farmers' Bank v. Gunnell*, 26 Grat. 131; *Schofield v. Bayard*, 3 Wend. 488.

excused. It is probably the law that the indorser's liability should be at once fixed by sending him notice; and, if the indorser can be notified, notice to him is not excused, for the law merchant insists on compliance with its formalities as far as they can be observed.<sup>83</sup>

The case of absence or death is also a question of due diligence. When the maker of a note has absconded, that will ordinarily excuse a demand, and notice of the fact is sufficient to hold all the indorsers.<sup>84</sup> Where the maker is a seaman on a voyage, having no domicile, the indorser is liable without a demand being made;<sup>85</sup> and in every case where the maker or acceptor has no known place of residence, or place at which the note can be presented, the holder will in like manner be excused from making any demand whatever. The commonest instance of this last general statement is where the maker or acceptor removes from the state, and continues to reside abroad until its maturity. It is deemed in such cases a better business rule that the holder shall not be bound to seek out the maker or his place of residence in the state to which he has removed for the purpose of presenting the instrument and demanding payment. It is probably also the law that he is not bound to present it at the last known place of residence of the maker or acceptor, though the cases are not explicit on this point. The most that is said is that a presentment will be sufficient if made at the last known place of residence;<sup>86</sup> but it probably would not be enjoined upon the holder that it be

<sup>83</sup> *Foster v. Julien*, 24 N. Y. 28; *Spies v. Gilmore*, 1 N. Y. 321; *McGruder v. Bank of Washington*, 9 Wheat. 598; *Juniata Bank v. Hale*, 16 Serg. & R. 157; *Gibbs v. Cannon*, 9 Serg. & R. 201.

<sup>84</sup> *Putnam v. Sullivan*, 4 Mass. 45; *Lehman v. Jones*, 1 Watts & S. 126; *Taylor v. Snyder*, 3 Denio, 145.

<sup>85</sup> *Barrett v. Wills*, 4 Leigh, 114.

<sup>86</sup> *Adams v. Leland*, 30 N. Y. 309; *Foster v. Julien*, 24 N. Y. 28.



done, because such a formality would be of no practical value. In case of death of the maker or acceptor, the general principle which we have stated above governs the case. If the instrument is made payable at a bank or other particular place, it must be still presented there. If its presentment be impossible, because of the death of the maker or acceptor, and no one can be found to whom to make presentment, its presentment will be excused. If a personal representative has been appointed, presentment and demand must be made to him.<sup>87</sup> And if there is no personal representative, and at the time of his death the maker or acceptor had a known place of residence, presentment should be made at his former residence.<sup>88</sup> In this case, as in all others, the death of the acceptor or maker never dispenses with notice to the drawers and indorsers of the fact of non-payment.<sup>89</sup>

The third class of cases mentioned in the principal text is what is known in strict legal parlance as "waiver." It may be of two kinds: (1) Expressed in words; or (2) implied from acts. It rests upon the doctrine of estoppel; for, when presentment of a bill or note at maturity or notice of its dishonor has been dispensed with by prior agreement, it would be a fraud upon the holder to hold him to the law merchant, and to permit him to suffer by acting upon the assurance of the party to whom he looks as security upon the paper. And it is fair that this should be enforced against the indorser, for the conditions of presentment and demand are for his benefit alone, and, if he chooses to waive them, he is to be estopped from denying his waiver.

<sup>87</sup> *Magruder v. Union Bank of Georgetown*, 8 Curt. Dec. 299, 3 Pet. 87; *Toby v. Maurian*, 7 La. 493; *Harp v. Kenner*, 19 La. Ann. 63; *Gower v. Moore*, 25 Me. 16.

<sup>88</sup> *Bank of Washington v. Reynolds*, 2 Cranch, C. C. 289.

<sup>89</sup> *Oriental Bank v. Blake*, 22 Pick. 208.



The commonest forms of express waiver are the words "presentation and protest waived," or "notices and protest of non-acceptance waived," or words similar in form and import, written or printed on the face of the bill, or over some or all the indorsements, or else on a separate piece of paper. Where it is written on the face of the bill or note, it applies to all the parties. Where it is written over some or all the indorsements, it applies only to those indorsements over which it is written. Where it is written on a separate piece of paper, the instrument is to be construed according to its terms. In extent, the waiver is construed to apply only to the acts which it specifies. Sometimes notice alone is waived; sometimes presentment; sometimes protest, in which last case the term "protest" is deemed to include all the formal facts which constitute dishonor. Any act, course of conduct, or language of the drawer or indorser calculated to induce the holder not to make demand or protest or give notice, or to put him off his guard, or any agreement by the parties to that effect, will dispense with the necessity of taking these steps as against any party so dealing with the holder.<sup>90</sup> The reason for this is that the conditions of demand and notice are for the benefit and protection of the indorser; and when his acts are such that the court cannot protect him without sanctioning a fraud or wrong, or when the indorser himself waives these proceedings, and consents to be bound without them, he is bound. The reason is that it is an obvious principle of law that a party to a contract may renounce the benefit

<sup>90</sup> Story, Bills, § 317; *Andrews v. Boyd*, 3 Metc. (Mass.) 434; *Norton v. Lewis*, 2 Conn. 478; *Taunton Bank v. Richardson*, 5 Pick. 436; *Leonard v. Gary*, 10 Wend. 504; *Boyd v. Cleveland*, 4 Pick. 525; *Phipson v. Kneller*, 4 Camp. 285, 1 Starkie, 116; *Bond v. Farnham*, 5 Mass. 170; *Corney v. Da Costa*, 1 Esp. 303; *Whitfield v. Savage*, 2 Bos. & P. 277; *Mead v. Small*, 2 Greenl. 207.

of any stipulation in it designed for his own protection.<sup>91</sup> Examples of waiver are where the drawer or indorser informs the holder that the bill will not be paid, or where the drawer tells the holder to hold it without presentment an indefinite time, or when the party puts any obstacle in the way of or prevents demand and notice, or makes an arrangement which will render demand unavailing, or when the indorser agrees to an extension of time on the instrument itself.

The fourth and last class is when the indorser is secured, and so there is no reason for the enforcement of the rule in his behalf. As we have already said, one of the principal objects of notice is to enable the indorser to obtain indemnity from the principal, and this has already in such case been attained. But the mere precaution by an indorser of taking security from his principal does not operate as a dispensation of a regular demand and notice. There must be something more, such as taking into his possession the funds or property of the principal, sufficient for the purpose of meeting the payment of the bill or note, or he must have an assignment of all the property, real and personal, of the makers for that purpose. The notice is dispensed with when funds are received, and not until then.<sup>92</sup> But even in such cases the indorser does not dispense with the necessity of presentment for payment;<sup>93</sup> and also, if the security be partial, and not entire, the presentment will not be dispensed with.<sup>94</sup> The test in such cases is whether any damage has arisen from the failure to give this notice. If

<sup>91</sup> *Sheldon v. Horton*, 43 N. Y. 93; *Pugh v. McCormick*, 14 Wall. 361; *Reynolds v. Douglass*, 12 Pet. 497; *Cady v. Bradshaw*, 22 N. E. Rep. 371, s. c. 116 N. Y. 188; *Ross v. Hurd*, 71 N. Y. 14.

<sup>92</sup> *Spencer v. Harvey*, 17 Wend. 489.

<sup>93</sup> *Seacord v. Miller*, 13 N. Y. (3 Kern.) 55.

<sup>94</sup> *Mechanics' Bank v. Griswold*, 7 Wend. 166.

it appears that no damage could have been suffered by the indorser, then presentment may be excused.<sup>95</sup>

### PROBLEMS.

(1) A draws a bill on B, payable at the "X Bank" three months after date. Is presentment to B for acceptance necessary?

(2) Bill accepted payable at a bank. At what time of day must it be presented, and where?

(3) The acceptor of a bill informs the holder that he will not pay it when due. Presentment is not made. May an indorser plead this as a defense and prevail? Why?

(4) B accepts a bill "payable at No. 1 Broadway, New York." B dies. Presentment is made at No. 1 Broadway. No search is made for B's executor. Can suit be maintained against an indorser on this presentment?

(5) Bill payable generally is presented for payment at 11 P. M. at the acceptor's private residence. Was this a proper hour?

(6) B makes a note payable at his house in Yonkers, and at the "Z Bank," New York. Where should presentment be made?

(7) B accepts a bill payable at the "Z Bank." At maturity the "Z Bank" holds the bill, but B has no assets there. Is this a sufficient presentment?

(8) Bill payable at the private residence of the payer is presented for payment at 8 P. M. Was this a proper hour?

(9) Bill drawn in England, payable in Charleston, S. C. At the time the bill matures, Charleston is besieged. The holder is not in Charleston, but in the Confederate army. Will laches in presentment be a defense if the holder be a Federal? Give your reason.

(10) B makes a note "payable at Buffalo, N. Y." B has no place of business or residence in Buffalo. The holder goes to Buffalo with the note on day of maturity. How is presentment made by him?

<sup>95</sup> Bond v. Farnham, 5 Mass. 170; Barton v. Baker, 1 Serg. & R. 334; Kelley v. Mayor of Brooklyn, 4 Hill, 263.



(11) Bill drawn by A, and indorsed by C, is dishonored. Due notice is given to C, but none is given to A. Can the holder sue C? Can he sue A, and, if so, after what course of proceeding?

(12) The drawer of a bill tells the holder before it is due that he has no fixed residence, and that he will call in a few days to see if the acceptor has paid the bill. Is the drawer entitled to notice?

(13) C is the first indorser of a dishonored bill held by D. D gives notice to C one day late. C, on the same day, gives notice to the drawer. Was this notice effectual?

(14) Bill addressed to "Mr. B, No. 1 Fifth avenue, New York." B accepts it generally. The holder takes the bill to No. 1 Fifth avenue, and inquires for B. A woman living in the house informs him that B has left. Is this a sufficient presentment?

(15) A notice is sent as follows: "I give notice that a bill," etc., (description,) "indorsed by you, lies at 1 Smith street, dishonored." Is this sufficient as a notice?

(16) A draws a bill on B, payable to C three months after date. Six days after it is drawn, C presents the bill to B for acceptance. B dishonors it. What remedy has C?

(17) C, the indorser of a bill held by D, receives notice of dishonor on Sunday morning. When may C send off notice to the drawer?

(18) The acceptor of a bill makes a general assignment before it matures. Presentment is not made. Is this a defense for an indorser?

(19) A letter sent as follows: "Your draft which became due yesterday is unpaid. Unless the same is paid immediately, I shall take proceedings." Is this sufficient as a notice of dishonor?

(20) Bill drawn on a banker is presented for acceptance after banking hours, and the bank is found closed. Was the bill dishonored?

(21) A draws a bill on B, who is under no obligation to accept or pay it, and has not held out that he will do so. It is presented and dishonored. Is A entitled to notice?

(22) A, in Pekin, China, draws a bill on B, in London, payable 90 days after sight. The payee holds it back for



two months, and then forwards it for presentment. A pleads this was an unreasonable delay. Give your opinion.

(23) A draws a bill on B in Buffalo, payable in New York. B accepts it, payable at the "Z Bank," New York. Presentment was not made at the "Z Bank," but to B in Buffalo, and he said all his money was in London. The drawer defends that bill was never properly presented. Is this tenable?

(24) A and B reside in Buffalo, where the carrier system is established. B deposits notice addressed to A in a street post-office box. Is this a proper notice?

(25) The holder's clerk wrote to an indorser that "B's acceptance due that day was unpaid, and requested his immediate attention to it." Is this sufficient?

(26) A bill indorsed by C and held by D is dishonored. X, who was at one time employed by the drawer to get the bill discounted, but is not in any way acting on D's behalf, informs C that the bill has been dishonored. Is this sufficient notice?

(27) The indorser of a bill gives a wrong address. In consequence, a notice posted in due time is a long while in reaching him. Is the indorser liable?

(28) B makes a note payable at the "X Bank." The holder brings an action against B without first presenting the note for payment. B shows that he was ready to pay on day of maturity at the place named. Judgment rendered for face of the note against B. B's costs since maturity are equal to the sum due on the judgment. What sum is realized by the holder?

(29) Notice to drawer of bill accepted by B: "Yours and B's note is now due, and your attention to the same will oblige." Is this sufficient?

(30) The holder of a bill does not know the indorser's address. Because of this, delay, occupied in making inquiries, is occasioned. Does this discharge the indorser?

(31) B makes a note payable at his office, which is at the place of date; and, before the note matures, removes his office from the state. What would you do in such a case?

(32) The drawer of a bill is a retired man of business. Verbal notice of dishonor is given to his wife at his house, in his absence. Is this sufficient?

(33) The indorser of a bill is a merchant. Verbal notice of dishonor is given to a clerk at his office. Is this sufficient?

(34) The drawer of a bill orders the drawee not to pay it. The holder hears of this. Presentment is not made. Does this failure avail an indorser?

(35) C, first indorser, D, second indorser, and E, holder. E residing in Buffalo, where bill is payable, deposits notice in the Buffalo post office, addressed to D, residing in Rochester. Is this giving proper notice? Whom could he recover against?

(36) A bill indorsed by C is held by D. D's agent gives notice of dishonor to the drawer, but by mistake gives it in C's name, instead of D's. Is this sufficient notice?

(37) The holder's clerk goes to the drawer, and tells him that his bill has been presented, and that the acceptor cannot pay it. The drawer replies that he will see the holder about it. Is this sufficient as a notice?

(38) C, the holder of a note specifying no place of payment, meets B, the maker, on the street on day of maturity, and presents it for payment. B merely says he is unable to pay it, and nothing more. Was this a sufficient presentment?

(39) A draws an accommodation bill on B, payable at his own house. B accepts it. Is A entitled to notice?

(40) D and E reside in Buffalo, but the bill is payable in Batavia. E delivers notice addressed to D to the letter carrier on his route at Batavia. Is this giving proper notice?

(41) C and D reside in Buffalo, and E in Rochester, where bill is payable. E mails at Rochester a letter to D, inclosing notices of dishonor to him and to C. D, upon receipt of the letter, deposits the notice to C in the post office at Buffalo. Is this giving proper notice?

(42) A notary takes the bill, with the notary's ticket attached, to the drawer's office, and shows it to a clerk there. The clerk looks at it, says the drawer is out and has left no orders. The notary then leaves the usual notice that the bill is due at his office. Is this sufficient?

(43) A draws, B accepts, and C indorses a bill in order to accommodate D, the second indorser. The bill is dishonored. What parties are entitled to notice?

(44) The holder of a dishonored bill goes to the drawer's place of business during business hours to give him notice of dishonor. He finds the place shut, and no one there of whom to make inquiries. Must other notice be given to the drawer?

(45) Notice sent as follows: "B's acceptance for \$50 due on Saturday is unpaid. He has promised to pay it in a week. I shall be glad to see you upon it." Is this sufficient?

(46) E resides in Buffalo. D also resides in Buffalo, and receives his mail at the Buffalo post office, but his residence is outside of the city line at Eggertsville, and some six miles from the office. E deposits notice addressed to D in the post office at Buffalo. Is this giving proper notice?

(47) Bill presented for payment by post. It is sent off in time to reach the drawee on the day of maturity, but, through death of the postmaster, is delayed some days. Will this be laches sufficient to defeat the claim of the holder?

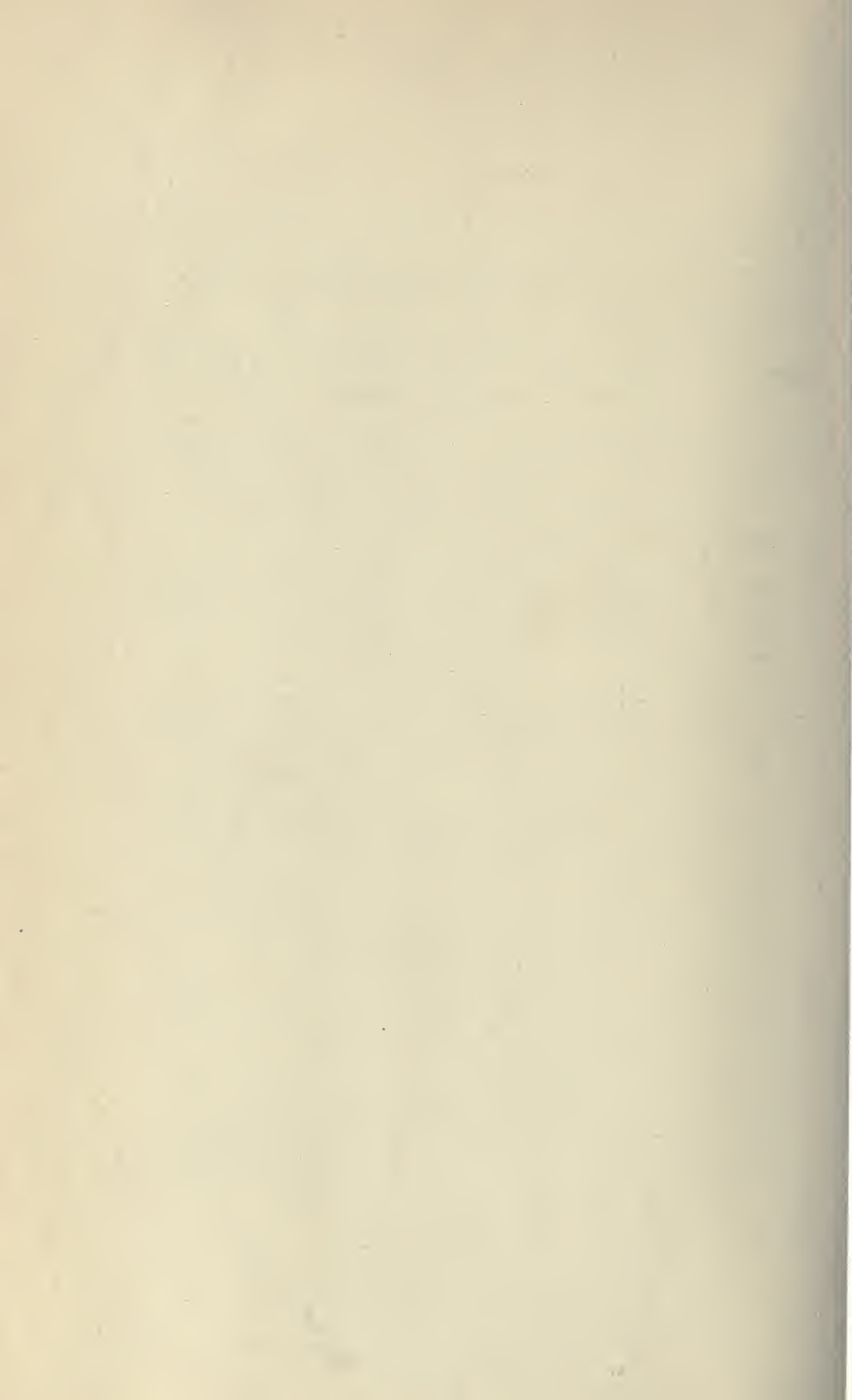
(48) The drawer of a bill orders the drawee not to pay it. Is he entitled to notice?

(49) The drawer of a bill informs the holder that it will not be paid on presentment. Is he entitled to notice?

(50) A bill payable in New York is indorsed in blank by the holder, and deposited with a banker in Yonkers, N. Y., for collection. The country banker's New York agent presents it for payment, and gives him due notice of its dishonor. The country banker, on the day after the receipt of such notice, gives notice to his customer, who in turn gives similar notice to his indorser. This last indorser pleads that he has not received due notice in a suit by the holder against him. Is this plea good?

(51) The following notice was left at the drawer's office by the holder's clerk: "B's acceptance to A, \$50, due January 1, is unpaid. Payment to D is requested before 4 P. M." Is this sufficient?

(52) A person sent by the holder goes to the house of the drawer, who is a retired business man, and, not finding the drawer, informs his wife that he has brought back the bill dishonored. The wife says she will tell her husband. Is this sufficient?





# TABLE OF CASES CITED.

[THE NUMBERS REFER TO PAGES.]

## A.

	Page
Adams v. Blethen.....	102
v. Leland.....	299
Agawam Bank v. Strever.....	150
Alderson v. Langdale.....	185, 189
Alger v. Thacher.....	207
Allen v. Rescous.....	204
v. Rightmere .....	112
v. Suydam .....	256
Anderson v. Drake.....	60
Andrews v. Boyd.....	301
v. Franklin .....	33
Angle v. Insurance Co.....	181
Archer v. Bank of England.....	124
v. Shea.....	142
Armstrong v. Toler.....	203
Arnot v. Pittston & E. Coal Co.....	207
Artcher v. Whalen.....	57
Artisans' Bank v. Backus .....	277
Atkinson v. Hawdon.....	189
v. Manks .....	6
Aymar v. Beers.....	256
v. Sheldon.....	133

## B.

Bacon v. Burnham.....	115
Baker v. Bliss....	236
Ballard v. Burgett.....	233
Ballingalls v. Gloster.....	136

	Page
Bank of Alexandria v. Swan.....	293
Bank of Chenango v. Hyde.....	150, 221
Bank of Columbia v. Lawrence.....	290, 291
Bank of Commerce v. Union Bank.....	124, 127, 186
Bank of Limestone v. Penick.....	188
Bank of Michigan v. Ely.....	87
Bank of Rochester v. Gray.....	136
Bank of Rutland v. Buck.....	148, 149, 221
Bank of Salina v. Babcock.....	223
Bank of Sandusky v. Scoville.....	224
Bank of State of New York v. Vanderhorst.....	221
Bank of Syracuse v. Hollister.....	269
Bank of U. S. v. Carneal.....	282
v. Daniel.....	21
v. Davis.....	284, 287
Bank of Utica v. Smith.....	287
Bank of Washington v. Reynolds.....	300
Barclay, Ex parte.....	236
Barney v. Worthington.....	87
Barrett v. Wills.....	299
Barrick v. Austin.....	7
Barry v. Equitable Life Assur. Soc.....	193, 194
Barton v. Baker.....	303
Bass v. Clive.....	124
Bathe v. Taylor.....	185
Batsford v. Every.....	203
Bay v. Coddington.....	222-224
Beardesley v. Baldwin.....	32
Bell v. Dagg.....	142
Bellasis v. Hester.....	63
Belmont Bank v. Hoge.....	231
Benedict v. Cowden.....	105, 188
v. Miner.....	185
Bennett v. Buchan.....	236
v. Farnell.....	51
v. Smith.....	179
Bentinck v. Dorrien.....	58
Benton v. Martin.....	59
Berkley v. Cannon.....	213
Birdsall v. Russell.....	12, 230
Black v. Caffé.....	121

	Page
Blackenhagen v. Blundell.....	49
Bliss v. Matteson.....	204
Block v. Bell.....	47
Boalt v. Brown.....	187
Bond v. Farnham.....	301, 303
Bookstaver v. Jayne.....	59, 105
Boulton v. Welch.....	282
Boyd v. Cleveland.....	301
v. Cummings.....	221
Boynton v. Page.....	203
Braham v. Bubb.....	32
Braman v. Hess.....	145
Bray v. Hadwen.....	287
Breck v. Cole.....	204
Brenzer v. Wightman.....	294
Brewster v. McCardell.....	60
Brigg v. Hilton.....	199
Briggs v. Merrill.....	234
v. Partridge.....	55
Brill v. Tuttle.....	35
Britton v. Dierker.....	184
v. Hall.....	162
Brown v. Ferguson.....	294
v. Jones.....	187
v. Leavitt.....	224
v. Mott.....	145, 149, 163
v. Taber.....	149
Bull v. Rice.....	174
v. Sims.....	48
Buller v. Crips.....	3
Burchfield v. Moore.....	186, 188
Burke v. McKay.....	260
Burns v. Rowland.....	224
Burt v. Dewey.....	144
Burton v. Stewart.....	199

C.

Cabot Bank v. Warner.....	291
Cady v. Bradshaw.....	302
Cambridge Bank v. Delano.....	236
Campbell v. French.....	63

	Page
Canajoharie Nat. Bank v. Diefendorf.....	226, 244
Canal Bank v. Bank of Albany....	124, 241
Capron v. Capron.....	33
Carnwright v. Gray.....	5, 62
Carruthers v. West.....	148
Carter v. Burley.....	294
Catlin v. Gunter.....	57
Caunt v. Thompson.....	276
Cayuga Co. Bank v. Warden.....	279, 282, 289
Chalmers v. Lanion.....	162
Chanoine v. Fowler.....	283
Chapman v. Keane.....	284, 287
v. White.....	72
Chappel v. Brockway.....	207
Chappell v. Spencer... ..	188
Charles v. Marsden.....	125, 148, 163
Chester v. Dorr.....	147, 164
Cholmeley v. Darley.....	105, 188
Chrysler v. Renois.....	39, 224
Church v. Howard.....	187
Claffin v. Boorum.....	150, 179
v. Lenheim.....	230
Clark v. Blackstock.....	188
v. Pease.....	195
v. Sisson .....	150
Clason v. Bailey.....	44
Cock v. Fellows.....	156
Cocks v. Masterman.....	124
Coddington v. Bay... ..	222
Coggill v. American Exch. Bank.....	241
Cole v. Saulpaugh.....	150
Colehan v. Cooke.....	33
Collins v. Locke.....	207
Colson v. Arnot.....	99
Colt v. Barnard.....	161
Commercial Bank v. Varnum.....	21, 261
v. Warren.....	183
Cook v. Litchfield.....	278
Cooke v. Satterlee.....	41
Coolidge v. Payson.....	84
Cooper v. Meyer.....	124



	Page
Corney v. Da Costa.....	301
Cota v. Buck.....	33
Coulter v. Richmond .....	116
Cowie v. Halsall.....	186
v. Stirling.....	49
Cowing v. Altman.....	57
Cowles v. Harts .....	282
Cox v. Troy.....	57
Cram v. Hendricks.....	180
Crawford v. West Side Bank.....	184
Cromwell v. Hewitt.....	117
Crouch v. Credit Foncier of England.....	16
Cummings v. Freeman.....	28
v. Williams.....	175
Cuyler v. Stevens.....	275, 289

D.

Dalrymple v. Hillenbrand.....	142
Darbishire v. Parker.....	293
Darwin v. Rippey .....	187
Davidson v. Cooper.....	182
Davis v. Clarke.....	77
v. Garr.....	50
Day v. Pool.....	199
Dayton v. Trull.....	266
Dean v. Hall.....	97, 114
Delaware Bank v. Jarvis.....	139, 141, 144
Delaware, L. & W. Ry. Co. v. Gilbert.....	54
De Mott v. Starkey.....	161
Den v. Wright.....	182
Denniston v. Bacon.....	149
Dewey v. Reed.....	187
De Witt v. Walton.....	55
Diamond Match Co. v. Roeber.....	207
Dickens v. Beal.....	21
Dobree v. Eastwood.....	287, 293, 295
Dodge v. Bank of Kentucky.....	294
Dole v. Gold....	279, 282
Doubleday v. Kress.....	258
Douglass v. Wilkeson. ....	15, 45, 49
Dows v. Kidder.....	232

	Page
Drake v. Rogers.....	60
Dresser v. Missouri.....	232
Drummond v. Drummond.....	47
Dry Dock Bank v. American Life Ins. Co.....	174
Dunavan v. Flynn.....	83
Duncan v. Berlin.....	72
v. Scott.....	243
Dunlop v. Gregory...	207
Durkin v. Cranston.....	22
Dutchess Co. Mut. Ins. Co. v. Hachfield.....	226

**E.**

Eadie v. Slimmon.....	193
Eagle Bank v. Chapin.....	287, 294
Earl v. Peck....	58, 200
East v. Smith.....	285
Eastman v. Shaw.....	56
Eckhert v. Ellis.....	164, 233
Edgar v. Boies.....	41
Ehrichs v. De Mill.....	35
Erwin v. Downs.....	140, 142
Etheridge v. Ladd.....	254
Evertson v. National Bank of Newport.....	12, 16, 46

**F.**

Fairchild v. Ogdensburgh R. Co.....	48
Fairley v. Roch.....	131
Farmers' Bank v. Duvall.....	294
v. Gunnell.....	298
v. Noxon.....	149, 233
Farmers' & Mechanics' Bank of Genesee v. Joslyn.....	178
Fassin v. Hubbard.....	103
Fay v. Smith.....	187
Ferner v. Williams.....	270
Ferris v. Brush.....	193
Finney v. Shirley.....	28
First Nat. Bank v. Green.....	244
Firth v. Thrush.....	284
Fisher v. Leland.....	234
Fitchburg Ins. Co. v. Davis.....	282

	Page
Foden v. Sharp.....	72
Follett v. Moore.....	41
Folsom v. Bartlett.....	161
Foster v. Julien.....	299
v. Mackinnon.....	193
Francia v. Joseph.....	223
Franklin Bank v. Raymond.....	258
Freeman Nat. Bank v. Savery....	237
Freeman's Bank v. Perkins.....	294
Frost v. Inhabitants of Belmont.....	205
Fry v. Fry.....	193
Fuller v. Dame.....	205
Fullerton v. Bank of U. S.....	294
Furze v. Sharwood.....	282, 283

G.

Gardner v. Gardner.....	193
v. Walsh.....	188
Garland v. Salem Bank.....	232
Gates v. Beecher.....	268
Germania Bank v. Distler.....	60
Gibbs v. Cannon.....	299
Gibson v. Minet.....	31, 45
Gilbert v. Dennis.....	282, 289
Gillett v. Averill.....	269
Goddard v. Merchants' Bank.....	124, 132
Goodman v. Eastman.....	186
v. Simonds.....	231
Goodrich v. Gordon.....	85
Gore v. Gibson.....	212
Gorham v. Keyes.....	206
Gower v. Moore.....	300
Grandin v. Le Roy.....	150
Grant v. Ellicott.....	125, 149, 163
v. Hunt.....	86
v. Vaughan.....	95, 99
Graves v. American Exch. Bank.....	99
Gray v. Hook.....	205
v. Milner.....	48, 78
v. Worden.....	39
Greele v. Parker.....	85

	Page
Green v. Goings.....	241
v. Skeel.....	55
Greenfield Bank v. Crafts.....	183
Gridley v. Bane. ....	191
Guernsey v. Rexford.....	176
Gulick v. Ward.....	205

## H.

Hall v. Haggart.....	175
v. Newcomb.....	116
Halliday v. McDougall.....	21, 260
Hamer v. Sidway.....	200
Hamilton v. Spottiswoode.....	26
Hare v. Henty.....	291
Harger v. Worrall.....	125, 243, 244
Harp v. Kenner.....	300
Harris v. Brisco. ....	206
v. White.....	202
Harrison v. Ruscoe.....	284, 285
Harrop v. Fisher.....	156
Harrow v. Dugan.....	28
Hartford Bank v. Barry.....	63
v. Stedman.....	290, 293, 294
Hartley v. Case.....	282
v. Wilkinson.....	105, 188
Harvey v. Martin.....	82
Hascall v. Life Ass'n.....	78
v. Whitmore.....	162
Haynes v. Rudd.....	206
Hays v. Hathorn.....	239
Heath v. Blake.....	182
Hedger v. Steavenson.....	281
Hedges v. Sealy.....	113, 156
Heermance v. Vernoy.....	139
Henderson v. Palmer.....	206
Herrick v. Carman.....	115
v. Whitney.....	139
Heuertematte v. Morris.....	125
Hickman v. Ryan.....	294
Hicks v. Marshall.....	209
Hill v. Cooley.....	186



	Page
Hilton v. Shepherd .....	286, 287
Hoare v. Cazenove .....	130
Hodges v. Shuler.....	37, 279
Holt v. Ross.....	128
Holtz v. Boppe.....	268
Home Ins. Co. v. Green.....	278
Hook v. Pratt.....	107
Hooper v. Williams.....	50
Hough v. Gray.....	112
Howard v. Ives.....	284, 287, 294
Hoyt v. Lynch.....	26
Huff v. Wagner.....	221
Huguenim v. Baseley.....	193
Huntington v. Ballou.....	183

I.

Iowa College v. Hill.....	233
Ireland v. Kip.....	289
Irving Nat. Bank v. Alley.....	52
Ivory v. Michael.....	187

J.

Jackson v. Alexander.....	5
v. Hudson.....	77
v. Richards.....	293
Jacobs v. Hart.....	184
Jaffray v. Brown .....	116
Jameson v. Swinton.....	286, 293
Jenney v. Herle .....	34
Jerome v. Whitney.....	5, 40
Jeune v. Ward.....	82
Johnson v. Collings.....	85
v. Haight .....	274
v. Heagan.....	188
Jones v. Gordon .....	237
v. Lees.....	207
Julliard v. Chaffee .....	58
Juniata Bank v. Hale .....	299

## K.

	Page
Kasson v. Smith .....	148
Kelley v. Mayor of Brooklyn.....	303
Kelly v. Solari.....	141
Ketchell v. Burns.....	112
Ketchum v. Barber .....	176
Kimball v. Huntingdon.....	62
King v. Bickley .....	283
v. Holmes.....	270
Kinne v. Ford .....	57
v. Johnson.....	193
Konig v. Bayard.....	132

## L.

Lambert, Ex parte.....	131
L'Amoureux v. Crosby.....	211
Lamoureux v. Hewit.....	111
Lawrence v. Miller.....	283
Lawson v. Farmers' Bank.....	294
Leather Cloth Co. v. Lorsont.....	207
Leavitt v. Putnam.....	99, 109, 160
Lee v. Murdock.....	185
v. Starbird.....	187
Leeds v. Lancashire.....	105, 188
Lehman v. Jones.....	299
Le Neve v. Le Neve.....	172, 227
Lenox v. Roberts.....	293
Leonard v. Gary.....	301
v. Leonard.....	211
v. Mason.....	36
Lewis v. Kramer.....	185
v. Payn.....	182
Lisle v. Rogers.....	185
Littauer v. Goldman.....	139
Little v. Slackford.....	25
Lloyd v. Sigourney.....	106
Long v. Moore.....	185
Loomis v. Ruck.....	193, 194
Louisiana State Bank v. Rowel.....	290
Lowery v. Steward.....	6

	Page
Luff v. Pope.....	80
Lyon v. Marshall .....	49
v. Mitchell.....	205

**M.**

McBlair v. Gibbes .....	203
McCall v. Taylor.....	46
McClelland v. Norfolk South. R. Co.....	17
McDonald v. Hodge.....	41
McEvers v. Mason.....	85
McGowen v. West.....	28
McGrath v. Clark.....	187
McGruder v. Bank of Washington.....	299
Macintosh v. Haydon.....	186
McKnight v. Wheeler.....	141, 180
McLaughlin v. McGovern.....	140
McNeil v. Tenth Nat. Bank.....	233
McSparran v. Neeley.....	212
Magee v. Badger.....	231
Magruder v. Union Bank of Georgetown.....	300
Manchester Bank v. Fellows.....	291
Markle v. Hatfield.....	189
Marrigan v. Page.....	28
Marshall v. Baltimore & O. R. Co.....	205
Martendale v. Follett.....	187
Martin v. Chantry.....	41
Marvin v. McCullum.....	56
Marvine v. Hymers.....	176
Mason v. Franklin.....	186
v. Lord.....	178
Master v. Miller.....	182, 184
Matthews v. Baxter.....	213
Maule v. Crawford.....	15
Mead v. Engs.....	287, 294
v. Small.....	301
Mechanics' Bank v. Griswold.....	302
v. Straiton.....	51
Mechanics' & Farmers' Bank v. Wixson.....	224
Mechanics' & Traders' Bank v. Crow.....	224, 243
Mellish v. Simeon.....	135
Merchants' Bank v. Elderkin.....	269

	Page
Merritt v. Earle.....	203
Mersman v. Werges.....	181
Mertens v. Winnington. ....	131
Meyer v. Hibsher.....	269
v. Huncke.....	189
Miers v. Brown.....	283
Miller v. Gilleland.....	185
v. Hackley.....	136
v. Hull.....	179
v. Race.....	95, 96, 99
v. Talcott.....	162, 233
v. Thomson.....	48
v. Zeimer.....	179
Mills v. Bank of U. S.....	282
v. Mills. ....	205
Mitchel v. Reynolds. ....	207
Mitchell v. Culver.....	60
Mohawk Bank v. Corey.....	150
Molton v. Camroux.....	209
Montross v. Clark.....	149
Moore v. Cross .....	116
v. McClure .....	55
v. Moore.....	233
Morehead v. Parkersburg Nat. Bank.....	186
Morford v. Davis.....	141
Morgan v. Van Ingen.....	286
v. Woodworth.....	287
Morse Twist, Drill & Mach. Co. v. Morse.....	207
Morton v. Naylor.....	6
Mott v. Hicks.....	55
Mullman v. D'Eguino.....	257
Munger v. Shannon.....	34
Munn v. Commission Co.....	180
Murray v. Lardner.....	225
Musson v. Lake.....	252, 254

## N.

National State Bank v. Rising.....	183
Nazro v. Fuller .....	186
Neff v. Horner.....	187



	Page
Newell v. Doty.....	150
Niagara Dist. Bank v. Fairman & W. Mach. Tool Manuf'g Co.....	76
Nichols v. Goldsmith.....	269
v. Johnson.....	182
Nicholson v. Gouthit.....	293
Nobles v. Bates .....	207
Northam v. Latouche.....	213
Northampton Nat. Bank v. Kidder.....	233
Norton v. Dreyfuss.....	199
v. Lewis.....	301
Norwich Bank v. Hyde.....	240

O.

Oakey v. Wilcox.....	186
Ocean Bank v. Faut.....	254
Oregon Steam Nav. Co. v. Winsor.....	207
Oriental Bank v. Blake.....	300
Ormes v. Beadel.....	194
Ormsbee v. Howe.....	191
Outhwaite v. Luntley.....	184
Owings v. Arnot.....	184

P.

Page v. Waring.....	230
Park Bank v. Watson.....	222
Parker v. Conner.....	236
v. Stroud.....	274
Patience v. Townley.....	298
Patterson v. McNeeley.....	187
v. Tod.....	161
Pattinson v. Luckley.....	182
Peacock v. Rhodes.....	95
Pearce v. Wilkins.....	146
Pearson v. Pearson.....	197
Penny v. Innes.....	108
Pentz v. Winterbottom.....	100
People v. Cromwell.....	266
v. Sargeant.....	202
Peto v. Reynolds.....	47
Phelps v. Vischer.....	115

	Page
Phipson v. Kneller .....	301
Phoenix Bank v. Hussey.....	21
Pierce v. Kittredge.....	83
Pierson v. Dunlop.....	85
Pigot's Case.....	182, 187
Pillans v. Van Mierop.....	85
Pinkham v. Macy.....	282
Pinnes v. Ely.....	102
Pinney v. Gleason.....	41
Platt v. Beebe.....	222
Plets v. Johnson.....	51
Powell v. Waters.....	150, 179, 180
Powers v. French.....	165
Pratt v. Coman.....	224
v. Short... ..	202
Prescott Bank v. Caverly.....	257
Price v. Campbell.....	174
v. Neal.....	123
Prideaux v. Criddle.. ..	291
Printing & Numerical Registering Co. v. Sampson.....	207
Prosser v. Luqueer.....	112
Pugh v. McCormick.....	302
Pulliam v. Withers.....	188
Pumpelly v. Phelps.....	55
Putnam v. Sullivan .....	299

## Q.

Quackenbush v. Leonard.....	177
-----------------------------	-----

## R.

Railroad Co. v. National Bank.....	222
Ransom v. Mack.....	290
Rapelye v. Anderson.....	145
Rees v. Overbaugh.....	182
Remer v. Downer.....	278
Remsen v. Graves.....	140, 142
Rex v. Treble.....	186
Reynolds v. Douglass.....	302
Rice v. Stearns.....	103
Richmond v. Diefendorf.....	238

	Page
Ripley v. Greenleaf.....	63
Robertson v. Kensington.....	104
Robinson v. Bland.....	202
Roehner v. Knickerbocker Life Ins. Co.....	63
Rogers v. Adams.....	195
Roll v. Raguet.....	206
Ross v. Hurd.....	302
Rousillon v. Rousillon.....	207
Rowe v. Tipper.....	287, 295
Ruff v. Webb.....	25
Russell v. Langstaffe.....	96
v. Powell.....	27

S.

Salt Springs Bank v. Burton.....	268
Sanders v. Bacon.....	105
Sanderson v. Collman.....	124
Saunderson v. Jackson.....	44
v. Judge.....	269
Sawyer v. McLouth.....	196
v. Warner.....	240
Saxton v. Johnson.....	5
Sayles v. Smith.....	208
Schepp v. Carpenter.....	148
Schofield v. Bayard.....	132, 298
Schoonmaker v. Roosa.....	197
Schwalm v. McIntyre.....	187
Seacord v. Miller.....	302
Sedgwick v. Stanton.....	205
Seneca Co. Bank v. Neass.....	150
Sewall v. Russell.....	283, 294
Seymour v. McKinstry.....	232
Shelburne Bank v. Townsley.....	291
Sheldon v. Benham.....	294
v. Horton.....	302
Shelton v. Carpenter.....	291
Shepard v. Hall.....	290
Shrieve v. Duckham.....	282
Simpson v. Stackhouse.....	188
Small v. Smith.....	149
Smedes v. Utica Bank.....	290

	Page
Smith v. Chester.....	124
v. Hiscock.....	162
v. Kendall.....	17
v. Mercer.....	124
v. Miller.....	266
v. Sawyer.....	131
v. Wilcox.....	203
Solarte v. Palmer.....	281
Solomons v. Bank of England.....	162
Southwick v. First Nat. Bank of Memphis.....	191
Spear v. Pratt.....	79
Spencer v. Ballou.....	148, 286, 288
v. Harvey.....	302
Spies v. Gilmore.....	113, 299
Spooner v. Holmes.....	12
Spurgin v. McPheeters.....	26
Stafford v. Yates.....	286, 288
Stalker v. McDonald.....	223
State v. Cilley.....	187
State Bank v. McCoy.....	212
Stein v. Yglesias.....	163
Stephens v. Graham.....	184, 186
Stewart v. Eden.....	60
v. Millard.....	267
v. Petree.....	176
Stocken v. Collins.....	232
Stocks v. Dobson.....	11
Storer v. Logan.....	83
Story v. Elliot.....	203
Strange v. Price.....	282
Sturtevant v. Ford.....	148, 163
Sudler v. Collins.....	186
Susquehanna Valley Bank v. Loomis.....	144
Sutton v. Toomer.....	187
Swift v. Tyson.....	220, 222-224
Swope v. Ross.....	71

## T.

Talbot v. Clark.....	294
Tappan v. Ely.....	105
Tassell v. Lewis.....	272



	Page
Taunton Bank v. Richardson.....	301
Taylor v. Snyder.....	60, 268, 299
Tevis v. Young.....	46
Thomas v. Roosa.....	40
Thompson v. Sloan.....	40
Tidmarsh v. Grover .....	186
Tillman v. Wheeler.....	115
Tindal v. Brown.....	284, 293
Toby v. Maurian.....	300
Tool Co. v. Norris. ....	205
Townsend v. Lorain Bank.....	282
Traders' Bank of Rochester v. Bradner.....	224
Treuttel v. Barandon.....	106
Troy City Bank v. Lanman.....	76
Trustees of Union College v. Wheeler. ....	13
Turnbull v. Bowyer.....	140
Tyler v. Gardiner.....	193
v. Young.....	161

U.

Ulster County Bank v. McFarlan.....	87
Underhill v. Phillips.....	62
United States v. White.....	16

V.

Van Brunt v. Eoff.....	182
Vandewall v. Tyrrell.....	181
Van Duzer v. Howe.....	189
Van Keuren v. Corkins.....	11
Veach v. Thompson.....	195
Voorhees v. Voorhees.....	193
Vosburgh v. Diefendorf.....	238, 244
Vyse v. Clarke.....	46

W.

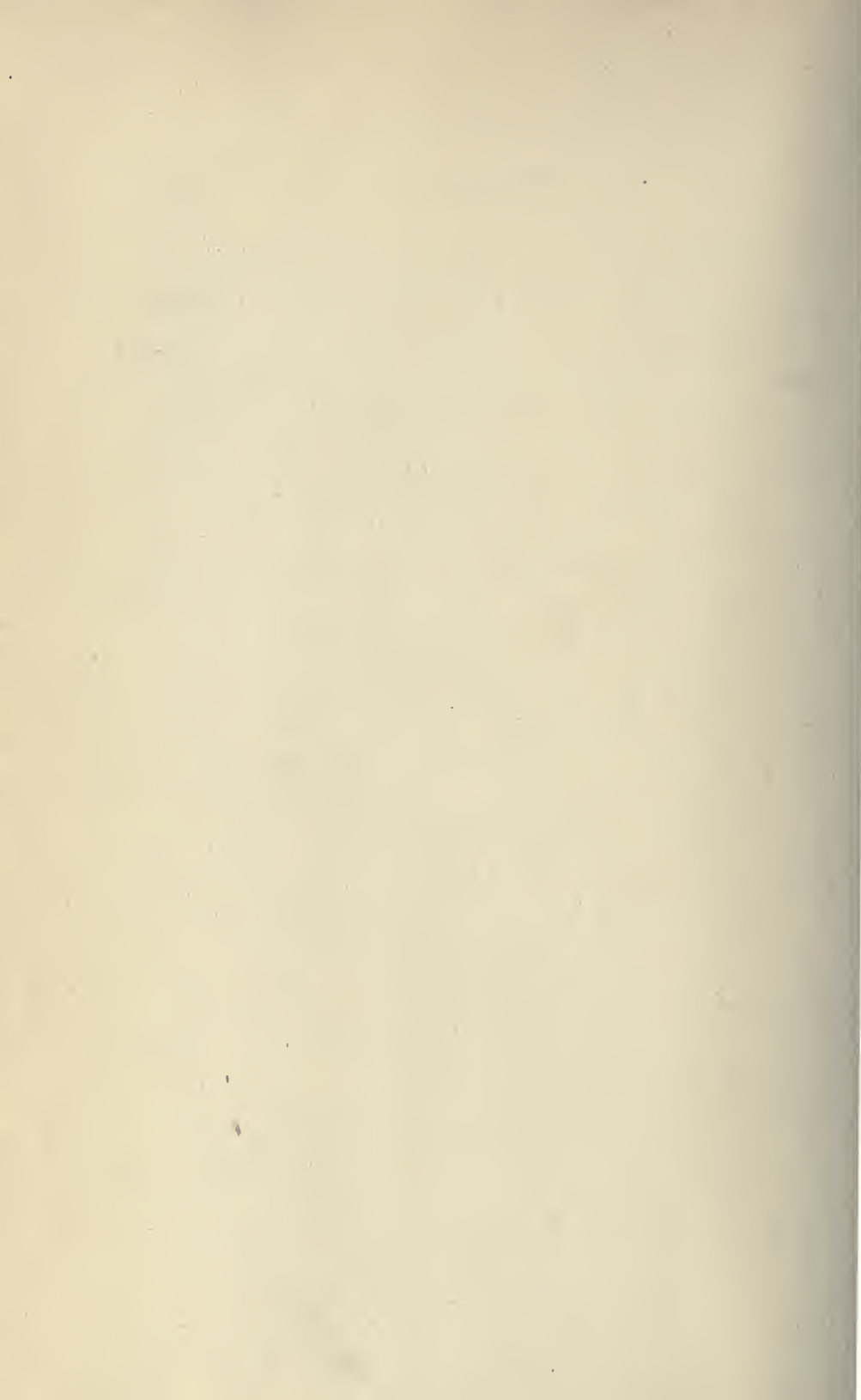
Wadsworth v. Sharpsteen.....	211
Walker v. Bank of State of New York.....	77
Wallace v. McConnell.....	72
Walrad v. Petrie.....	45, 49

	Page
Walters v. Brown.....	293
Walton v. Hastings.....	184
Wardell v. Howell.....	149
Waring v. Smyth.....	182
Warren v. Gilman.....	282, 291
Warrington v. Early.....	187
Waterman v. Vose.....	187
Watervliet Bank v. White.....	100
Watkins v. Maule.....	156
Watson v. Evans.....	50
v. Randall.....	224
Weaver v. Barden.....	224, 232
Wegersloff v. Keene.....	74
Welch v. Sage.....	231
Weldon v. Buck.....	136
Welford v. Beazely.....	44
Wells v. Whitehead.....	22
West River Bank v. Taylor.....	284, 287
Wheatley v. Strobe.....	26
Wheeler v. Barret.....	161
Wheelock v. Freeman.....	188
White, Ex parte.....	188
v. Continental Nat. Bank.....	128, 141
v. Haas.....	186
v. Kuntz.....	204
Whitehead v. Walker.....	252
Whitfield v. Savage.....	301
Whitmer v. Frye.....	187
Whitney v. National Bank of Potsdam.....	141
Whittaker v. Howe.....	207
Wickes v. Caulk.....	182
Wilkie v. Roosevelt.....	179
Wilkinson v. Johnson.....	124
Williams v. Germaine.....	130, 131
v. Matthews.....	162
Williamson v. Brown.....	228
Wilson v. Nisbet.....	212
v. Rocke.....	244
Windham Bank v. Norton.....	298
Winsted Bank v. Webb.....	178
Winter v. Drury.....	72

	Page
Winter v. Livingston.....	197
Wise v. Charlton.....	36
Wolcott v. Van Santvoord .....	72, 121, 186, 274
Wood v. Steele.....	181, 185
Woodin v. Foster.....	269, 275, 289
Woodthorpe v. Lawes.....	282
Woodworth v. Bank of America.....	186, 269
Worth v. Case.....	58, 200

**Y.**

Young v. Hill.....	177
Youngs v. Lee.....	221





# INDEX.

---

[THE NUMBERS REFER TO PAGES.]

---

## A.

### ABSENCE,

preventing presentment for payment, 295, 297-300.

### ACCEPTANCE,

defined, 70.

effect discussed and explained, 70-73.

necessary to bind drawee, 120.

that there will be, warranted by drawer, 135.

requisites, 73-76, 79-81.

must be by the drawee, 73, 76.

reason and explanation, 76-78.

misnomer of drawee, 78.

name of drawee omitted, 43, 78.

may be by drawee's agent, 76, note.

joint drawees, 76, note.

delivery probably necessary to complete, 73, 78.

conflicting doctrines, 78.

revocation before delivery, 57, 58.

must be absolute, 74, 79-81.

must be according to tenor of bill, 73, 74.

reason for rule explained, 74-76.

"tenor of bill" defined, 74.

what is a change of the tenor, 74-76.

qualified, when valid, 74.

as to subsequent parties, 74-76.

as to prior parties assenting, 74-76.

before signature by drawer, 83, note.

after bill is overdue, 83, note.

[The numbers refer to pages.]

ACCEPTANCE—Continued.

- after dishonor and protest, 83, note.
- sufficiency, 79-81.
- forms and varieties, 73, 79-81.
- express, in drawee's words, 73, 79-81.
- constructive or implied, 73, 79-83.
  - what constitutes, 82, 83.
  - retention of bill, 82, 83.
  - destruction of bill, 82.
- for honor or supra protest, 73, 76. See, also, "Acceptor."
  - defined, 88.
  - Method, 88, 129-131.
  - several acceptors for honor of different parties, 88, note.
  - time of, 88, note.
  - option of holder to refuse, 88, note.
  - for part of sum only, 88, note.
  - after dishonor, 88.
  - after protest for better security after acceptance, 88, note.
- parol acceptance, 79-81.
  - of future bill, 87.
  - statute of frauds, 87, note.
- writing on bill itself, 73, 79.
- statutory requirement of writing, 80, 81.
- in writing and signed, 83.
- on separate paper, 73, 79, 83-87.
  - where bill is in existence, 83.
  - bill not in existence, 83.
  - letter describing bill to be drawn, 83.
  - bill drawn reasonable time after letter, 84.
  - holder must take bill on credit of letter, 84.
  - description of bill in letter, 86, 87.
  - statutory provisions, 86.
- cure of failure to name drawee, 43, 78.
  - of drawer's failure to sign, 42, 47.
- promise to accept, 83-87.
- for accommodation, see "Accommodation Paper."
- presentment for, see "Presentment."
- notice of non-acceptance, see "Notice."
- acceptor's rights and liabilities, see "Acceptor."

[The numbers refer to pages.]

**ACCEPTANCE—Continued.**

- facts admitted by, see "Estoppel."
- warranties by acceptor, see "Warranties."
- estoppel of acceptor, see "Estoppel."
- of non-negotiable bill, see "Non-Negotiable Instruments."

**ACCEPTOR,**

- defined, 22.
- obligations and liabilities, 70-73, 120, 121.
- is the principal debtor, 121.
- effect of non-presentment, 271.
- for honor or supra protest, 129-132. See, also, "Acceptance."
  - liability, 129-132.
  - undertaking analogous to indorser's, 129.
  - method of consummating liability, 129-131.
  - failure to pay, 131, 132.
  - presentment to original drawee at maturity, 129, 130.
  - protest for non-payment by drawee, 129, 130.
  - presentment to acceptor supra protest, 129, 130.
  - protest on latter's failure to pay, 129, 130.
  - notice of non-payment, 129, 130.
  - probably estopped like ordinary acceptor, 129, 131.
  - rights and remedies on payment, 129, 131, 132.
  - subrogation to holder's rights, 131.
- capacity, estoppel of indorser, 137.
- the acceptance, see "Acceptance."
- for accommodation, see "Accommodation Paper."
- estoppel of, see "Estoppel."
- warranties by, see "Warranties."
- damages recoverable against, see "Damages."
- of non-negotiable bill, see "Non-Negotiable Instruments."

**ACCIDENT,**

- preventing presentment for payment, 295, 297-300.

**ACCOMMODATION PAPER,**

- accommodation party, defined, 145.
  - liability of, 145-150.
  - no liability to party accommodated, 145, 146.
  - remedy against party accommodated, 146, 147.
  - cannot sue on instrument, 146, 147.

[The numbers refer to pages.]

**ACCOMMODATION PAPER**—Continued.

- discharge by transfer after maturity, 146, 147.
- estoppel of acceptor, 125, 126.
- commissions to, not usury, 175, 176.
- accommodated party, his contract, 145.
  - to pay bill or note, 145.
  - to repay accommodation party, 145.
  - cannot sue accommodation party, 147.
- diversion and misapplication, 148-150.
  - immaterial diversion, 148-150.
- transfer when overdue, rights and liabilities, 160, 162-164.

**ACCORD AND SATISFACTION,**

- no defense against bona fide holder, 245.

**ACTION,**

- by holder in own name, 8.
- by assignee, in whose name, 8, 9.
  - statutory provisions, 10.
  - suits in equity, 10.
- between accommodation and accommodated party, 147.
- defenses, see "Defenses."
- evidence, see "Evidence."

**ACT OF GOD,**

- preventing presentment for payment, 295, 297-300.

**ACTUAL NOTICE,**

- see "Purchaser for Value without Notice."

**ADMINISTRATORS,**

- see "Executors and Administrators."

**AGENT,**

- see "Principal and Agent."

**ALIEN ENEMIES,**

- capacity, to incur liability, 52.
- to transfer instrument, 52.
- warranty of, see "Warranties."

**ALLONGE,**

- defined, 94.



[The numbers refer to pages.]

#### ALTERATION OF INSTRUMENT,

defined, 181.

effect in general, 181.

immaterial alteration does not avoid instrument, 181, 183.

filing of blank date in by holder, 59, 60.

of indorsement in blank, 95-97.

material alteration, avoids the instrument, 181.

good defense against bona fide holder, 170, 181-189, 245, 246.  
reason, 181, 182.

intent immaterial, 181, 182.

by consent of parties does not avoid, 181, 183.

nor where made by a stranger, 182, 183.

when alteration material, 184-189.

changing effect and imposing additional burden, 184-187,  
189.

change in date, 60, 184, 185.

in time of payment, 184, 185.

in place of payment, 184, 186.

in amount, 184, 186, 187.

in medium of payment, 184, 187.

in rate of interest, 184, 186, 187.

changing liabilities and obligations of parties, 184, 187-  
189.

adding or removing signature, 184, 187, 188.

changing operation, or effect in evidence, 184, 188, 189.

adding words of negotiability, 184, 188.

adding words of special consideration, 184, 188, 189.

changing form of indorsement, 184, 188, 189.

changing liability from joint to several, 184, 188.

recovery on original consideration, 189.

estoppel to set up alteration as a defense, 189.

of indorser, 137-142.

of acceptor, 128.

#### AMOUNT,

must be certain, 24, 38.

exceptions, interest and exchange, 39.

alteration, 184, 186, 187.

change of, by the indorsement, 110.

[The numbers refer to pages.]

**ANTECEDENT DEBT,**

see "Purchaser for Value without Notice."

**ANTEDATING,**

effect, 59, 60.

**ASSENT,**

to alteration of instrument, 181, 183.

to qualified acceptance, 74-76.

**ASSIGNEE,**

of instrument, see "Assignment."

of bankrupt, see "Bankruptcy."

**ASSIGNMENT,**

distinguished from negotiation, 7-13.

consideration necessary, 11, 12.

notice to debtor necessary, 7, 10, 11.

assignee takes no better title than assignor, 8.

in whose name action brought, 8, 9.

statutory provisions, 10.

suits in equity, 10.

by transfer without indorsement, 154-157.

**AT SIGHT,**

use of words, 30.

**ATTORNEY'S FEES,**

effect of provision for, 42.

**B.**

**BANKRUPTCY,**

of payee, transfer to assignee by operation of law, 159.

estoppel of acceptor, 122, 126.

of payee or holder, transfer by assignee, 156.

of drawer, estoppel of acceptor, 125.

**BEARER,**

instrument payable to, 14-17, 45-46.

indorsement, see "Indorsement."

transfer, see "Transfer."

**BESOIN,**

see "Case of Need."

[The numbers refer to pages.]

**BILL OF EXCHANGE,**

- defined, 19.
- origin and history, 1 et seq.
- indicia of negotiability, 14-17.
- distinction between foreign and inland, 3, 20, 21.
- essentials, 24.
- form, foreign, 19, 20.
  - inland, 20.
- instrument not good as, treated as note, 47, 48.
- tenor of, 73-76.
- amount, see "Amount."
- consideration, see "Consideration."
- delivery, see "Delivery."
- indorsement, see "Indorsement."
- parties, see "Parties."
- signing, see "Signature."
- the order to pay, see "Order or Promise."
- time and place of payment, see "Payment."
- transfer, see "Transfer."
- presentment for acceptance, see "Presentment."
- for payment, see "Presentment."

**BLANK,**

- in date, effect, 59, 60.
  - filling in by holder, 59, 60.
- indorsement in, see "Indorsement."

**BONA FIDE HOLDER,**

- see "Purchaser for Value without Notice."

**BONA FIDES,**

- see "Purchaser for Value without Notice."

**BREACH,**

- of promise to accept, damages, 128.
- of warranties, see "Warranties."
  - damages recoverable, see "Damages."

**BURDEN OF PROOF,**

- see "Evidence."

[The numbers refer to pages.]

**CANCELLATION,**

of instrument, defense against bona fide holder, 245, 246.

**CAPACITY,**

of parties in general, 52-55.

to incur liability and to transfer instrument, 52-55.

persons non compos mentis, 52.

married women, 52.

infants, 52.

corporations acting ultra vires, 52.

alien enemies, 52.

transfer by trustees, 53, 54.

by guardian, 53, 54.

by executors and administrators, 53, 54.

by agent, 53-55.

incapacity as a defense, 169-173, 245.

insanity and intoxication, 169, 245.

adjudged lunatics and drunkards, 245.

infancy, 169, 245.

coverture, 169, 245.

of drawee, warranty by drawer, 135, 136.

of drawer, estoppel and warranty by acceptor, 122, 125, 126.

of payee to indorse, estoppel of acceptor, 122, 126.

warranty by indorser, 137-142.

**CASE OF NEED,**

right to designate persons to resort to, 43, § 36, b.

**CAVEAT EMPTOR,**

not applicable to negotiable instruments, 12.

**CERTAINTY,**

as to parties, see "Parties."

as to order or promise to pay, see "Order or Promise."

as to amount, see "Amount."

as to time and place of payment, see "Payment."

**CERTIFICATE,**

by notary of dishonor, 264, 265.

**CHAMPERTY,**

see "Consideration."



[The numbers refer to pages.]

CHANGE,

of instrument, see "Alteration of Instrument."

CHOSE IN ACTION,

see "Non-Negotiable Instruments."

COERCION,

see "Duress."

COLLATERAL SECURITY,

for antecedent debt, transfer as, see "Purchaser for Value  
without Notice."

COMMISSIONS,

what constitutes usury, 175-177.

COMMON CURRENCY,

instrument cannot be payable in, 38.

COMPOUND INTEREST,

effect of taking, 176, 177.

COMPOUNDING FELONY,

see "Consideration."

COMPULSION,

see "Duress."

CONDITIONAL INDORSEMENT,

see "Indorsement."

CONDITIONS,

as to payment, see "Order or Promise."

of acceptance, see "Acceptance."

of delivery, see "Delivery."

CONFLICT OF LAWS,

liability of indorser, 133, 134.

CONSENT,

to alteration of instrument, 181, 183.

to qualified acceptance, 74-76.

CONSIDERATION,

defined, 196.

presumption of, 61, 62, 195, 196, 240-243.

may be rebutted, 195, 196.

for non-negotiable instrument, 62.

[The numbers refer to pages.]

**CONSIDERATION—Continued.**

- words "value received," meaning, 61.
  - use or omission of, 5, 6.
  - not necessary, 61, 62.
- sufficiency, 195-200.
- recital of may be contradicted, 195.
- mere inadequacy as a defense, 198-200.
  - executory consideration, 199.
- want or failure of as a defense, 160, 198-200, 245.
  - distinguished from inadequacy, 198-200.
  - want or total failure a defense between immediate parties, 198-200.
  - partial, a defense pro tanto as between immediate parties, 198-200.
  - recoupment or counterclaim on partial failure, 198, 199.
  - no defense against bona fide holder, 198-200, 245.
  - estoppel of indorser, 137-142.
  - estoppel of acceptor, 122, 125.
- illegal, as a defense, 201-208.
  - avoids instrument between immediate parties, 201, 208.
  - separate contract based on, 201, 203.
  - as against bona fide holder, 201-208, 245.
  - statutory prohibitions, 201-203.
    - gambling contracts, 201-203.
    - violation of Sunday law, 201-203.
  - evil and immoral agreements, 201-204.
  - agreements against public policy, 201, 205-207.
    - agreement to use influence to procure election to public office, 205.
    - or appointment, 205.
    - or to procure legislation, 205.
    - forbearance to bid on government contract, 205.
    - obstructing justice, 205, 206.
    - compounding felony, 205, 206.
    - champerty and maintenance, 205, 206.
    - restraint of trade and monopolies, 205-207.
  - presumption and burden of proof, 243.
- for indorsement and transfer, necessary, 94, 143-145.
  - presumption, 8, 61.

[The numbers refer to pages.]

CONSIDERATION—Continued.

- necessary in case of assignment, 10, 11.
- alteration by adding words of special, 184, 188, 189.
- for accommodation, see "Accommodation Paper."
- sufficiency to constitute purchase for value, see "Purchaser for Value without Notice."

CONSTRUCTION,

- of acceptances, 79-81.

CONSTRUCTIVE,

- acceptance, see "Acceptance."
- delivery, see "Delivery."
- notice, see "Purchaser for Value without Notice."

CONTRACT,

- of acceptor, see "Acceptor."
- supra protest, see "Acceptor."
- of accommodation party, see "Accommodation Paper."
- of accommodated party, see "Accommodation Paper."
- of drawer, see "Drawer."
- of indorser, see "Indorser."
- of maker, see "Maker."

CO-SURETY,

- adding or removing signature, 184, 187, 188.

CORPORATIONS,

- capacity, to incur liability, 52, 108.
  - to transfer instrument, 52, 108.
- estoppel of indorser, 137-142.
- estoppel of acceptor, 122, 125, 126.

COUNTERCLAIM,

- on partial failure of consideration, 198, 199.

COVERTURE,

- see "Husband and Wife."

CURRENCY,

- instrument cannot be payable in, 38.

CURRENCY OF MISSOURI,

- instrument cannot be payable in, 38.

CURRENT BANK NOTES,

- instrument cannot be payable in, 38.

[The numbers refer to pages.]

**CURRENT BANK PAPER,**

instrument cannot be payable in, 38.

**CURRENT FUNDS,**

instrument cannot be payable in, 38.

**CURRENT MONEY,**

instrument cannot be payable in, 38.

**CUSTOM OF MERCHANTS,**

the source of negotiability, 2, 3.

**D.**

**DAMAGES,**

for which acceptor is liable, 128.

amount of bill, 128.

legal interest, 128.

notary's charges, 128.

loss on re-exchange, 128.

for breach of promise to accept, 128.

recoverable against drawer or indorser, inland bill, 143-145.

foreign bill, 143-145.

**DATE,**

of instrument, discussed, 59, 60.

not necessary to validity, 59, 60.

may be supplied by parol, 59.

effect of omission, 60.

filling of blank by holder, 59, 60.

antedating, 59, 60.

postdating, 59, 60.

place of, as place of payment, 60.

presumption of time of execution, 60.

rebuttal by parol, 60.

alteration of, 60, 184, 185.

**DAYS OF GRACE,**

what are, 62.

when allowed, 63, 64, 271-273.

computation, 62, 63, 271-273.

Sundays and legal holidays, 63, 64, 271-273.



[The numbers refer to pages.]

**DEATH,**

- of payee or holder, transfer to representative, 159.
- indorsement by representative, 156.
- preventing presentment for payment, 295, 297-300.

**DEFALCATION,**

- use of words "without defalcation," 15.

**DEFENSES,**

- equities enforceable against assignee, 7, 8, 12, 13.
- against transferee of overdue paper, 160-164.
- as against immediate parties, 164-167.
- real and personal, defined and classified, 169-213.
- generally of defenses against bona fide holder, 12, 13, 169-173.
- alienage, see "Alien Enemies."
- alterations, see "Alteration of Instrument."
- cancellation of instrument, see "Cancellation."
- coverture, see "Husband and Wife."
- disability of corporation, see "Corporations."
- duress, see "Duress."
- estoppel to set up, see "Estoppel."
- failure of consideration, see "Consideration."
- fraud, see "Fraud."
- illegal consideration, see "Consideration."
- infancy, see "Infants."
- insanity and idiocy, see "Non Compos Mentis."
- intoxication, see "Non Compos Mentis."
- usury, see "Usury."
- want of consideration, see "Consideration."

**DEFINITIONS,**

- acceptance, 70.
  - express, 79.
  - constructive or implied, 73, 79-83.
  - qualified, 74.
  - for honor or supra protest, 88.
- acceptor, 22.
- accommodation paper, 145.
- accommodated party, 145.
- accommodation party, 145.

[The numbers refer to pages.]

DEFINITIONS—Continued.

- allonge, 94.
- alteration of instrument, 181.
- antecedent debts, 219.
- bill of exchange, 19.
- bona fides, 225.
- bona fide purchaser, 217.
- case of need, 43, § 36, b.
- consideration, 196.
- days of grace, 62.
- delivery, 56.
- dishonor, 275.
- drawee, 22.
- drawer, 22.
- duress, 192.
- escrow, 56, 58.
- fraud, 189-191.
- good faith, 225.
- holder, 23.
  - bona fide, 217.
- holder for value, 217.
- immediate parties, 164.
- indorsee, 23.
- indorser, 23.
- indorsement, 91-93.
  - conditional, 101.
  - in full, 98.
  - qualified, 101.
  - restrictive, 101.
  - special, 98.
  - without recourse, 101.
- in case of need, 43, § 36, b.
- legal tender, 38-41.
- maker, 23.
- money, 38-41.
- negotiability, 7-13.
- negotiation, 154.
- notice of dishonor, 275.

[The numbers refer to pages.]

DEFINITIONS—Continued.

- notice to purchaser, 226, 227.
  - actual, 226.
  - constructive, 226, 228.
- payee of bill, 22.
  - of note, 23.
- personal defenses, 169, 170.
- presentment, 249.
- promise, 27.
- promissory note, 22.
- protest, 259, 264.
- purchaser for value without notice, 217.
- real defenses, 169.
- "reasonable time" for presentment, 255-257.
- remote parties, 164.
- tenor of bill, 74.
- "usual and reasonable hours" for presentment, 262, 263.
- usual course of business, 233.
- usury, 173.
- value received, 61.
- without recourse, 101.

DELAY,

- in presentment, see "Presentment."

DELIVERY,

- meaning of term, 56.
- discussed, 56-58.
- what amounts to, 57.
- actual, 56.
- constructive, 56.
- in escrow, 56, 58.
- conditions subsequent, 58.
- necessity, 24, 56.
  - to complete indorsement, 94.
- probably necessary to complete acceptance, 73, 78.
  - conflicting doctrines, 78.
- to effect transfer, see "Transfer."

[The numbers refer to pages.]

**DEMAND,**

- necessary to indorser's liability, 134, 135.
- on indorser of non-negotiable instrument, not necessary, 7.
- use of words "on demand," 30.
- of acceptance, see "Presentment."
- of payment, see "Presentment."

**DESTRUCTION,**

- of bill as acceptance, 82.

**DISABILITIES,**

- incapacity in general, see "Capacity."
- insanity, see "Non Compos Mentis."
- intoxication, see "Non Compos Mentis."
- infancy, see "Infant."
- coverture, see "Husband and Wife."
- alienage, see "Alien Enemies."
- of corporation, see "Corporations."

**DISCHARGE,**

- of accommodation party, 146, 147.
- by non-presentment, 265, 266.
- by delay in presentment, 255.
- by failure to give notice of dishonor, 256.
- by failure to give notice of non-acceptance, 266, 267.
- by alteration, see "Alteration of Instrument."
- by payment, see "Payment."

**DISCOUNT,**

- at illegal rate, see "Usury."

**DISEASE,**

- preventing presentment for payment, 295, 297-300.

**DISHONOR,**

- of bill, what constitutes, 251.
- acceptance after, 83, note.
- notice of, see "Notice."

**DIVERSION,**

- of accommodation paper, 148-150.



[The numbers refer to pages.]

**DRAWEE,**

- defined, 22.
- bill must be addressed to some one, 43, 46, 47.
- exceptions, accepted bill, 43.
  - drawer and acceptor the same person, 43, 48.
  - drawee a fictitious person, 48.
  - designating persons in case of need, 43.
  - drawee otherwise identified, 43, 48.
- liability before and after acceptance, 70-73.
- not bound until acceptance, 120.
- misnomer, 78.
- name omitted, 78.
- existence warranted by drawer, 135.
- capacity, warranty by drawer, 135, 136.
- see, also, "Acceptance;" "Acceptor."

**DRAWER,**

- defined, 22.
- must sign instrument, 42, 46, 47.
- exceptions, accepted draft, 42, 47.
  - name in body of instrument, 43.
  - signing by agent, 43.
  - mark, initials, pencil or printing, 43.
- signing, 44.
  - after acceptance, 83, note.
- as payee, 50, 51.
- liability explained, 70-73, 132-135.
- after acceptance regarded as indorser, 121.
- discharge by failure to present for acceptance, 265, 266, 271.
  - for payment, 265, 266, 271.
- right to draw, estoppel of acceptor, 122, 125.
- existence of, warranty by acceptor, 122, 124.
- signature, warranty by acceptor, 122-124.
- capacity, warranty by acceptor, 122, 125, 126.
  - by indorser, 137.
- adding or removing signature, 184, 187, 188.
- damages recoverable against, 143-145.
- estoppel of, see "Estoppel."
- warranties by, see "Warranties."

[The numbers refer to pages.]

**DRUNKENNESS,**

see "Non Compos Mentis."

**DUE BILL,**

not negotiable, 28.

**DUE COURSE OF BUSINESS,**

see "Purchaser for Value without Notice."

**DURESS,**

defined, 192.

by and on whom, 192.

as a defense, 192-195.

as against bona fide holder, 192-195, 245.

presumption and burden of proof, 243.

**E.**

**EQUITIES,**

see "Defenses."

**ERASURES,**

see "Alteration of Instrument."

**ESCROW,**

delivery in, 56, 58.

**ESSENTIALS,**

of bill or note, 24 et seq.

**ESTOPPEL,**

in case of fictitious payee, 43, 51, 52.

by representations, to set up defense of usury, 177.

to set up alteration as a defense, 189.

of acceptor, 122-128.

to deny drawer's signature, 122-124.

drawer's existence, 122, 124.

capacity of drawer, 122, 125, 126.

drawer's right to draw, 122, 125.

payee's competency to indorse, 122, 126.

acceptance for accommodation, 125, 126.

not to deny genuineness of payee's indorsement, 127.

genuineness of terms of bill, 127, 128.

of acceptor for honor, same as acceptor, (supra,) 129, 131.

[The numbers refer to pages.]

**ESTOPPEL**—Continued.

- of drawer, to deny existence of drawee, 135.
  - to deny drawee's capacity to accept, 135, 136.
    - that drawee will accept, 135.
  - to set up defense of usury, 180.
    - other warranties same as indorser's, 136.
- of indorser, to deny genuineness of bill or note, 137-142.
  - to deny genuineness of parties, 137-142.
    - validity and force of instrument, 137-142.
    - capacity of prior parties, 137-142.
    - title and right to transfer, 137-142.
- of indorser without recourse, same as indorser, (*supra*), 142, 143.
- to require presentment, see "Presentment."
  - notice of dishonor, see "Notice."

**EVIDENCE,**

- of intention to commit usury, 174.
- order of proof in action by holder, 239-244.
- presumption and burden of proof, as to bona fide holder, 239-244.
  - as to notice to purchaser, 228-230, 236-239.
- fraud, 243.
- insanity and drunkenness, 209, 210.
- as to consideration, 8, 61, 62, 195, 196, 240-243.
- in case of alteration of instrument, 182, 183.
- diligence in presentment, 265.
- of acceptance, 82, 83.
- as to place of payment, 60.
- of time of execution from date, 60.
- whether first or second indorser, 113, 117.
- possession prima facie evidence of title, 8, 12, 241, 257, 258.
  - bill payable to bearer or indorsed in blank, 258.
  - bill unindorsed by payee, 258.
- possession by another than the indorsee, 258.
  - possession by agent, 258.
- from possession of non-negotiable instrument, 7.
- parol evidence, to supply date, 59.
  - to rebut presumption from date, 60.
  - to contradict recital of consideration, 195.
    - see, also, "Estoppel."

[The numbers refer to pages.]

**EXCHANGE,**

effect of provision for, 39.

liability of acceptor, loss on re-exchange, 128.

**EXECUTORS AND ADMINISTRATORS,**

transfer to by operation of law, 159.

indorsement and transfer by, 53, 54, 156.

note payable to, indorsement by all, 156.

presentment to, 300.

**EXEMPTIONS,**

effect of waiver of, 42.

**EXHIBITION,**

of paper at time of presentment, 253, 254.

**EXPRESS ACCEPTANCE,**

see "Acceptance."

**F.****FAILURE,**

of consideration, see "Consideration."

**FEEs,**

of notary, liability of acceptor, 128.

of drawer and indorsers, 143.

**FEME COVERT,**

see "Husband and Wife."

**FICTITIOUS NAME,**

drawee, 48.

payee, 43, 50-52.

holder claims by estoppel, 43, 51, 52.

estoppel of indorser, 137.

warranty of genuineness, see "Warranties."

**FIRM,**

see "Partnership."

**FOREIGN BILL,**

see "Bill of Exchange."

**FORGERY,**

of indorsement, 99.

of payee's indorsement, acceptor not estopped, 127, 128.



[The numbers refer to pages.]

**FORGERY**—Continued.

estoppel of indorser, 137-142.

of drawer's signature, estoppel of acceptor, 122-128.

**FORM,**

of negotiable instrument, 14-17.

of bill of exchange, foreign, 19, 20.

inland, 20.

of promissory note, 22, 23.

of notice of dishonor, 275.

of acceptance, see "Acceptance."

of indorsement, see "Indorsement."

**FRAUD,**

defined, 189-191.

what constitutes, 190, 191.

as a defense, between immediate parties, 190.

as against bona fide holder, 191, 192, 245.

against transferee of overdue paper, 160.

presumption and burden of proof, 243.

**FRAUDS, STATUTE OF,**

parol acceptance, 87, note.

**FUNDS CURRENT,**

instrument cannot be payable in, 38.

**FUTURE BILL,**

parol acceptance, 87.

promise to accept, 83-87.

**G.**

**GAMING CONSIDERATION,**

effect on instrument, 201-203.

as a defense, 201-203, 245.

estoppel of indorser, 137-142.

**GIFT,**

indorsement by way of, 108.

**GOOD FAITH,**

see "Purchaser for Value without Notice."

[The numbers refer to pages.]

**GOODS,**

promise to pay in, 39-41.

**GRACE,**

see "Days of Grace."

**GUARDIAN AND WARD,**

transfer of instrument by guardian, 53, 54.

**H.****HISTORY,**

see "Origin and History."

**HOLDER,**

defined, 23.

right to fill blank in date, 59, 60.

bona fide, see "Purchaser for Value without Notice."

See, also, "Indorsee."

**HOLDER IN DUE COURSE,**

see "Purchaser for Value without Notice."

**HOLIDAY,**

effect in computing days of grace, 63, 64, 271-273.

**HONOR,**

acceptance for, see "Acceptance;" "Acceptor."

**HOURS,**

hour of presentment, 262, 263.

**HUSBAND AND WIFE,**

married woman as party, 52.

estoppel of acceptor, 122, 125, 126.

estoppel of indorser, 137-142.

transfer to husband of holder by operation of law, 159.

wife as payee, indorsement by husband, 156.

coverture as a defense, 169, 245.

**I.****IDENTITY,**

see "Payment."

**IDIOCY,**

see "Non Compos Mentis."

[The numbers refer to pages.]

**ILLEGAL CONSIDERATION,**

as a defense, see "Consideration."

**IMMEDIATE PARTIES,**

to indorsement, defined, 164.

defenses against, see "Defenses."

**IMMORAL AGREEMENTS,**

see "Consideration."

**IMPLIED,**

acceptance, see "Acceptance."

warranty, see "Warranties."

notice to purchaser, see "Purchaser for Value without Notice."

waiver of presentment, see "Presentment."

of notice of dishonor, see "Notice."

**INADEQUACY,**

of consideration, see "Consideration."

**INDICIA,**

of negotiability, 14-17.

**INDORSEE,**

defined, 23.

right to fill blank in date, 59, 60.

of overdue paper, rights, 160-164.

bona fide holder, see "Purchaser for Value without Notice."

**INDORSEMENT,**

defined, 91-93.

requisites, 110-113.

form of words, 94.

words of assignment, 111-113.

words of guaranty, 111-113.

name of holder, 94.

place on instrument, 93.

allonge, attaching paper, 94.

must be by payee or a subsequent holder, 110.

must follow tenor of instrument, 110.

nature. 107-110.

effect in general, 91-93.

transfers title to instrument, 108.

cannot split right of action, 110, 111.

[The numbers refer to pages.]

INDORSEMENT—Continued.

- nor change amount, 110, 111.
- nor change time, place, or manner of payment, 110.
- consideration necessary, 94, 143-145.
  - presumption of, 61.
- delivery necessary, 94.
- capacity of parties in general, 52-55.
- by trustees, 53, 54.
- by person non compos mentis, 52.
- by married women, 52.
- by infants, 52, 108.
- by guardian, 53, 54.
- by executor or administrator on death of payee, 53, 54, 156.
- by executors to whom note payable, 156.
- by assignee of bankrupt, 156.
- by corporation acting ultra vires, 52, 108.
- by alien enemies, 52.
- by agent, 53-55.
- by husband of payee, 156.
- by partner for firm, 156.
- transfer by joint payees, 156.
- by way of gift, 108.
- capacity of payee, estoppel of acceptor, 122, 126.
- who are indorsers, 113-117.
- first or second indorser, presumption, 113-117.
- the contract resulting from, 107-110, 132-135.
- conditional, 101, 103-105.
  - defined, 101.
  - condition does not affect negotiability, 101.
  - payment to indorsee before condition fulfilled, 101, 105.
- in blank, 94-98, 158, 159.
  - meaning and effect, 94.
  - successive indorsements in blank, 95.
  - conversion by holder into special indorsement, 95, 158, 159.
  - how made, 95.
  - rights of bona fide holder, 95-98.
- in full or special, 98-101, 158, 159.
  - defined, 98.
  - effect, 98, 158, 159.



[The numbers refer to pages.]

**INDORSEMENT—Continued.**

some in full, with others in blank, 98-101, 158, 159.

anomalous, 113-117.

partial, 110-113.

restrictive, 101, 106, 107.

defined, 101.

without recourse or qualified, 101-103.

defined, 101.

form, 102.

effect, 108.

of overdue paper, 160-164.

validity between immediate parties, 164-167.

who are immediate parties, 164.

forgery of, 99.

genuineness not warranted by acceptor, 127.

changing form of, 184, 188, 189.

consideration, see "Consideration."

for accommodation, see "Accommodation Paper."

effect of usury, see "Usury."

transfer by, see "Transfer."

**INDORSER,**

defined, 23.

who are indorsers, 113-117.

first or second, presumption, 113-117.

anomalous indorsers, 113-117.

liability of, explained, 132-135.

presentment to drawee, acceptor, or maker necessary, 134, 135.

demand necessary, 134, 135.

protest necessary, 134, 135.

discharge by failure to present for acceptance, 265, 266, 271.

for payment, 265, 266, 271.

of overdue paper, liability, 161-164.

adding or removing signature, 184, 187, 188.

capacity, estoppel of subsequent indorser, 137.

of non-negotiable instrument, liability, 7.

not entitled to notice, 7.

not entitled to demand, 7.

[The numbers refer to pages.]

INDORSER—Continued.

- for accommodation, see "Accommodation Paper."
- estoppel of, see "Estoppel."
- warranties by, see "Warranties."
- damages recoverable against, see "Damages."

INFANT,

- as party, 52, 108, 122, 125, 126.
- capacity, to incur liability, 52, 108.
- to transfer instrument, 52, 108.
- estoppel of acceptor, 122, 125, 126.
- estoppel of indorser, 137-142.
- infancy as a defense, 169, 245.

INITIALS,

- use in signing, 43.

INLAND BILL,

- see "Bill of Exchange."

INNOCENT INDORSER,

- see "Purchaser for Value without Notice."

INSANITY,

- see "Non Compos Mentis."

INSTALLMENT,

- instrument payable in, 30.

INTENTION,

- as to negotiability, 14-17.
- to become party to instrument, 44, 45.
- in altering instrument, immaterial, 181, 182.
- to take usury, necessary, 174.
- how shown, 174.

INTEREST,

- effect of provision for, 39.
- alteration of rate, 184, 186, 187.
- liability of acceptor or maker, 128, 271.
- of drawer or indorser, 143-145.
- compounding, effect, 176, 177.
- illegal interest, see "Usury."

[The numbers refer to pages.]

INTERPRETATION,

see "Definitions;" "Construction."

INTOXICATION,

see "Non Compos Mentis."

I. O. U.,

not negotiable, 29.

IRREGULAR INDORSEMENT,

see "Indorsement."

J.

JOINT AND SEVERAL LIABILITY,

alteration, effect, 184, 188.

JUDGMENT,

power to confess, effect, 42.

K.

KNOWLEDGE,

of dishonor, distinguished from notice, 275, 276.

L.

LACHES,

in presentment, see "Presentment."

LARCENY,

of instrument indorsed in blank, 95-98.

LAW MERCHANT,

origin and growth, 3.

LEGAL TENDER,

what is, 38-41.

LOAN.

what constitutes, 174, 175, 181.

usury, see "Usury."

LOSS,

of instrument indorsed in blank, 95-98.

LUNACY,

see "Non Compos Mentis."

[The numbers refer to pages.]

## M.

### MAINTENANCE,

see "Consideration."

### MAKER,

defined, 23.

signing, 44.

must sign instrument, 42, 46, 47.

exceptions, name in body of instrument, 43.

signing by agent, 43.

mark, initials, pencil or printing, 43.

as payee, 43, 50, 51.

obligation and liability, 120, 121.

effect of non-presentment, 271.

adding or removing signature, 184, 187, 188.

capacity, estoppel of indorser, 137.

for accommodation, see "Accommodation Paper."

### MARK,

use in signing, 43.

### MARRIED WOMEN,

see "Husband and Wife."

### MATERIALITY,

of alteration, see "Alteration of Instrument."

### MATURITY,

see "Overdue Paper."

### MEDIUM OF PAYMENT,

must be money, 29, 38.

meaning of term "money," 38-41.

terms excluded by rule, 38.

connected promise to do other acts, 38, 41.

giving option as to medium, 30, 37, 38.

alteration in, effect, 184, 187.

change by indorsement, 110.

### MENTAL CAPACITY,

see "Capacity."

### MINOR,

see "Infant."



[The numbers refer to pages.]

MISAPPLICATION,  
of accommodation paper, 148-150.

MISNOMER,  
of drawee, acceptance, 78.

MONEY,  
meaning of term, 38-41.

MONOPOLIES,  
see "Consideration."

## N.

NAME,  
of drawee, misnomer, 78.  
omission, 78.  
of holder in indorsement, 94.  
fictitious, see "Fictitious Names."  
signing, see "Signature."

NEED.  
see "Case of Need."

NEGLIGENCE,  
see "Estoppel;" "Payment."

NEGOTIABILITY,  
purpose, use as circulating medium, 1.  
illustrations, 2, 3.  
origin, 2-7.  
as to notes, 3.  
unnecessary to form or substance of note or bill, 2.  
statute of 3 & 4 Anne, 3-5.  
indicia, 14-17.  
distinguished from assignability, 7-13.  
intention of parties, 14-17.  
not affected by conditional indorsement, 101.  
alteration by adding words of, 184, 188.

NEGOTIATION,  
defined, 154.  
what constitutes, 8.  
as distinguished from assignment, 7, 8.

NON COMPOS MENTIS,  
insanity or intoxication of party, 52, 122, 125, 126.

[The numbers refer to pages.]

NON COMPOS MENTIS—Continued.

- capacity to incur liability, 52.
- to transfer instrument, 52.
- estoppel of acceptor, 122, 125, 126.
- estoppel of indorser, 137-142.

- insanity and drunkenness as a defense, 169, 208-213, 245.
  - probably available between immediate parties, 208-213.
  - doubtful as against bona fide holder, 208-213, 245.
  - rules in case of drunkenness, 210-212.
- adjudged lunatics and drunkards, 211, 245.
- return of consideration, 211.

NON-NEGOTIABLE INSTRUMENTS,

- distinguished from negotiable, 2.
- treated as choses in action, 2.
- bills, are mere assignments or orders, 6.
- notes, proof of consideration, 5, 6.
- use or absence of words "value received," 5, 6.
- presumption as to consideration, 62.
- acceptance of non-negotiable bill, 6.
  - acceptor's liability, 6.
  - consideration necessary, 6.
- transferable by assignment not indorsement, 7.
- possession not evidence of title, 7.
- assignee may sue indorser in own name, 7.
  - must sue maker in payee's name, 7.
  - statutory provisions, 10.
  - suits in equity, 10.
- title of transferee subject to equities, 7.
- indorsers, liability, 7.
  - cannot insist on demand and notice, 7.

NOTARY PUBLIC,

- presentment, protest, and notice by, 257-261.
  - proceedings to be taken, 264, 265.
- the proper person to present foreign bill, 257.
- fees of, liability of acceptor, 128.
  - of drawer and indorsers, 143.

NOTE,

- see "Promissory Note."

[The numbers refer to pages.]

NOTES RECEIVABLE IN BANK,

instrument cannot be payable in, 38.

NOTICE,

to purchaser of defenses, see "Purchaser for Value without Notice."

of assignment of non-negotiable instrument, 7, 10, 11.

of dishonor, defined, 275.

of non-acceptance, necessity, 266, 267.

on presentment before due, 256.

absence of damage from failure to give, 266, 267.

in case of non-payment, necessity, 249, 250, 275, 276.

in case of non-negotiable instrument, 7.

in case of acceptance for honor, 129, 130.

either verbal or written, 275.

form of words, 275.

notice and knowledge distinguished, 275, 276.

elements of notice, 276, 277.

description of instrument, 277-279.

statement of presentment, demand, and non-payment, 279-283.

statement of intention to hold drawer or indorser, 282, 283.

by whom given, 283-286.

by agent, 283, 284.

by stranger to instrument, 283-285.

to whom given, 283-286.

to whose benefit notice inures, 286-288.

proof of receipt, 286.

method of giving notice, 288-292.

parties residing in same town, 288-292.

parties in different towns, 288-292.

verbal notice, 288, 289.

written notice, actual delivery, 288-292.

deposit in post office, 288-292.

time of giving notice, 292-295.

waiver of, 295-303.

by express agreement in instrument, 295, 300-302.

or on separate paper, 296, 300-302.

forms of express waiver, 301.

implied from acts of parties, 296, 300-302.

[The numbers refer to pages.]

NOTICE—Continued.

person sought to be charged secured against loss, 296, 302, 303.

drawer without reason to expect payment, 295-297.

presentment impossible, 295, 297-300.

accident, superior force, or disease, 295, 297-300.

sickness, absence, or death of maker, 295, 297-300.

O.

OBSTRUCTING JUSTICE,

see "Consideration."

OMISSION,

of date, 59, 60.

of drawer's name, 78.

ON DEMAND,

use of words, 30.

ONUS PROBANDI,

see "Evidence."

OPERATION OF LAW,

transfer by, see "Transfer."

OPTION,

to refuse acceptance for honor, 88, note.

in holder to take other than money, 30, 37, 38.

ORAL,

acceptance, see "Acceptance."

evidence, see "Evidence."

indorsement, see "Indorsement."

notice, see "Notice."

ORDER,

use of words "or order," 14-17.

to pay in bill, see "Order or Promise."

ORDER OR PROMISE,

order to pay necessary to bill, 24.

promise necessary to note, 24.

meaning and sufficiency, 24-27.

leading cases on order, 25-27.

promise defined, illustrations, 27-29.



[The numbers refer to pages.]

**ORDER OR PROMISE—Continued.**

sufficiency of promise in note, 24.

certainty as to terms, 29-38.

must be without conditions or contingencies, 24, 29.

why conditions not allowed, 30-38.

exception as to presentment, etc., 29.

certain event at uncertain time, 29.

time of payment must be certain, 38.

what promises are absolute, 30.

on demand, 30.

at sight, 30.

fixed period after sight, 30.

no time expressed, 30.

in installments, 30.

amount must be certain, 38.

exception as to interest and exchange, 39.

must be to pay money, 29, 38.

meaning of term "money," 38-41.

terms excluded by rule, 38.

connected promise of other acts, 38, 41.

power to confess judgment, 42.

waiver of exemptions, 42.

costs of collection and attorneys' fees, 42.

giving holder option to take other than money, 30, 37, 38.

cannot be out of particular fund, 29, 34, 35.

when payment so charged, 29, 30.

stipulations not of essence of promise, 30, 36, 37.

legal tender, 38-41.

in goods, 39-41.

alteration of, see "Alteration of Instrument."

**ORIGIN AND HISTORY,**

of negotiable instruments, 2-7.

**OVERDUE PAPER,**

acceptance of overdue bill, 83, note.

transfer of, 160-164.

rights and liabilities, 160-164.

accommodation paper, 160, 162-164.

purchaser charged with notice of equities, 234, 235.

[The numbers refer to pages.]

## P.

### PAROL,

- acceptance, see "Acceptance."
- evidence, see "Evidence."
- indorsement, see "Indorsement."
- notice, see "Notice."

### PARTIAL INDORSEMENT,

- see "Indorsement."

### PARTICULAR FUND,

- payment out of, see "Order or Promise."

### PARTIES,

- explanation of term, 44.
- instrument must be specific as to, 24, 42.
  - rule discussed and explained, 44-52.
- intention to become, 44, 45.
- original, to bill, 22.
  - to promissory note, 23.
- subsequent, to bill, 23.
  - to promissory note, 23.
- immediate and remote, to indorsement, 164.
- adding or removing signature, 184, 187, 188.
- capacity of, see "Capacity."
- estoppel to deny genuineness and capacity, see "Estoppel."
- warranty of capacity, see "Warranties."
- for particular parties, see "Acceptor;" "Drawee;" "Drawer;" "Holder;" "Indorser;" "Indorsee;" "Maker;" "Payee;" "Purchaser for Value without Notice;" "Transferee;" "Transferrer."

### PARTNERSHIP,

- as payee, indorsement and transfer, 156.
- transfer to surviving partners by operation of law, 159.

### PAYEE,

- defined, of bill, 22.
- of promissory note, 23.
- must be pointed out by the instrument, 43-49.
- illustrations, 49, 50.

[The numbers refer to pages.]

**PAYEE**—Continued.

- must be a person, natural or legal, 43.
- must be in being when instrument issued, 43.
- persons named in alternative, 43.
- bearer, 45, 46.
- fictitious, 43, 50–52.
  - holder claims by estoppel, 43, 51, 52.
- maker or drawer as, 43, 50, 51.
- right to fill blank in date, 59, 60.
- joint payees, indorsement and transfer, 156.
- competency to indorse, estoppel of acceptor, 122, 126.
- adding or removing signature, 184, 187, 188.
  - see, also, "Indorser."

**PAYMENT**,

- medium of payment, must be money, 29, 38.
  - meaning of term "money," 33–41.
  - terms excluded by rule, 38.
  - connected promise of other acts, 38, 41.
  - giving option as to medium, 30, 37, 38.
  - alteration, 184, 187.
  - change by indorsement, 110.
- place of payment, presumption from date, 60.
  - alteration, effect, 184, 186.
  - change by indorsement, 110.
- time of payment, must be certain, 24, 38.
  - certain event at uncertain time, 29, 32, 33.
  - in installments, 30.
  - alteration, effect, 184, 185.
  - change by indorsement, 110.
  - days of grace, see "Days of Grace."
- when a discharge, to holder, 12.
  - to wrong person, 258.
  - under forged indorsement, 99.
  - to assignee of non-negotiable instrument, 10, 11.
  - to conditional indorsee, 101, 105.
  - as against transferee of overdue paper, 160.
  - before due, as against bona fide holder, 245.
- presentment and demand for, see "Presentment."

[The numbers refer to pages.]

**PENCIL,**

use in signing, 43.

**PERSONAL DEFENSES,**

see "Defenses."

**PLACE,**

on instrument, for signature, 44.

for indorsement, 93.

of payment, presumption from date, 60.

alteration, effect, 184, 186.

change by indorsement, 110.

of presentment, see "Presentment."

**PLAGUE,**

preventing presentment for payment, 295, 297-300.

**PLEDGEER,**

as bona fide holder, see "Purchaser for Value without Notice."

**POSSESSION,**

of instrument necessary at time of presentment, 253, 254.

as prima facie evidence of title, 8, 12, 257, 258.

bill payable to bearer or indorsed in blank, 258.

bill unindorsed by payee, 258.

possession by another than the indorsee, 258.

possession by agent, 258.

**POSTDATING,**

effect, 59, 60.

**POST OFFICE,**

see "Notice."

**POWER,**

to confess judgment, effect, 42.

**PRE-EXISTING DEBT,**

see "Purchaser for Value without Notice."

**PRESENTMENT,**

for acceptance, 134, 135, 249-303.

a condition embodied by the law merchant, 249, 250.

necessity, to hold drawer, 134, 135, 251, 252.

to hold indorser, 134, 135, 252.

in case of acceptance for honor, 129, 130.



[The numbers refer to pages.]

**PRESENTMENT—Continued.**

- manner of presentment, 253, 254.
  - possession of instrument necessary, 253, 254.
  - paper must be exhibited, 253, 254.
  - demand of acceptance, 254.
- time of presentment, 255-257.
  - bills payable at sight or on demand, 255-257.
  - what constitutes reasonable time, 255-257.
  - bills payable at a certain time, 255, 256.
- who may make, 257-261.
  - inland bill, 257, 259-261.
  - foreign bill, 257, 259-261.
  - possession prima facie evidence of title, 257, 258.
  - bill payable to bearer or indorsed in blank, 258.
  - bill unindorsed by payee, 258.
  - possession by another than the indorsee, 258.
  - possession by agent, 258.
- distinguished from protest, 259.
- place of presentment, 261, 262.
- hour of presentment, 262, 263.
  - "usual and reasonable hours," 262, 263.
- effect of failure to present, 265, 266.
- for payment, 134, 135, 249-303.
  - a condition embodied by the law merchant, 249, 250.
  - manner of presentment, 253, 254.
    - possession of instrument necessary, 253, 254.
    - paper must be exhibited, 253, 254.
    - demand of payment, 254.
  - time of presentment, 255-257, 271.
    - instrument payable at sight or on demand, 255-257.
    - what constitutes reasonable time, 255-257.
    - instrument payable at a certain time, 255, 256.
  - days of grace, 271-273.
    - when allowed, 63, 64, 271-273.
    - computation, 62, 63, 271-273.
    - Sundays and legal holidays, 63, 64, 271-273.
  - who may make, 257-261.
    - inland bill, 257, 259-261.
    - foreign bill, 257, 259-261.

[The numbers refer to pages.]

**PRESENTMENT**—Continued.

- possession prima facie evidence of title, 257, 258.
  - instrument payable to bearer or indorsed in blank, 253.
  - instrument unindorsed by payee, 258.
  - possession by another than the indorsee, 258.
  - possession by agent, 258, 259.
- distinguished from protest, 259.
- hour of presentment, 262, 263.
  - "usual and reasonable hours," 262, 263.
- effect of failure to present, 265, 266.
- place of presentment, 267-271.
  - duty to have funds at place specified, 267, 269, 270.
- personal demand, 267-271.
- when demand excused, 268.
- effect of non-presentment, 271-274.
  - as to liability of acceptor or maker, 271.
  - discharges drawer and indorsers, 271.
- waiver of, 295-303.
  - by express agreement in instrument, 295, 300-302.
  - or on separate paper, 296, 300-302.
  - forms of express waiver, 301.
  - implied from acts of parties, 296, 300-302.
- person sought to be charged secured against loss, 296, 302, 303.
- drawer without reason to expect payment, 295-297.
- presentment impossible, 295, 297-300.
  - accident, superior force, or disease, 295, 297-300.
  - sickness, absence, or death of maker, 295, 297-300.

**PRESUMPTION,**

see "Evidence."

**PRINCIPAL AND AGENT,**

- signing by agent, 43.
- agent may accept bill, 76, note.
- transfer of instrument by agent, 53-55.
- presentment by agent, 258.
- notice by agent of dishonor, 283, 284.

**PRINCIPAL AND SURETY,**

- adding or removing co-surety's signature, 184, 187, 188.

[The numbers refer to pages.]

PRINTING,

use in signing, 43.

PROMISE,

to accept, see "Acceptance."

to pay, see "Order or Promise."

PROMISSORY NOTE,

defined, 22.

origin of negotiability, 1.

indicia of negotiability, 14-17.

form, 22, 23.

instrument treated as, when not good as bill, 47, 48.

amount, see "Amount."

consideration, see "Consideration."

delivery, see "Delivery."

indorsement, see "Indorsement."

parties, see "Parties."

presentment for payment, see "Presentment."

signing, see "Signature."

the promise to pay, see "Order or Promise."

time and place of payment, see "Payment."

transfer, see "Transfer."

PROTEST,

defined, 259, 264.

distinguished from presentment, 259.

in case of non-acceptance, 263-265.

on non-payment, 263-265.

in case of acceptance for honor, 129, 130.

by a notary, 259, 260.

by others in absence of notary, 259, 260.

proceedings to be taken, 264, 265.

necessary to indorser's liability, 134, 135.

necessary in case of foreign bill, 259-261.

not necessary in case of note or inland bill, 259-261.

statutory changes, 259.

waiver of, includes presentment and notice, 301. See "Notice;"

"Presentment."

acceptance after, 83, note.

acceptance supra protest, see "Acceptance."

[The numbers refer to pages.]

**PUBLIC POLICY,**

agreements in contravention of, see "Consideration."

**PURCHASER FOR VALUE WITHOUT NOTICE,**

what constitutes, 217-243.

valuable consideration necessary, 217-219.

antecedent or pre-existing debt as consideration, 219-225.

what an antecedent indebtedness, 219.

probably sufficient, 219.

transfer as collateral to indebtedness, 219-222.

debt contracted on faith of instrument, 220, 221.

previous debt not yet due, 220.

surrender of other securities, 220, 221.

forbearance, 221.

payment and release of pre-existing debt, 221.

extent of recovery, 222.

purchase must be bona fide, 217, 225, 226.

meaning of good faith, 225.

absence of notice necessary, 225.

notice, defined, 226, 227.

either actual or constructive, 226, 227.

time of acquiring notice, 231, 232.

must be at or before acquirement of paper, 231, 232.

before entire consideration is paid, 231, 232.

purchaser with notice from bona fide holder, 232, 233.

takes free from equities, 232, 233.

actual notice, defined, 226.

constructive notice, defined, 226, 228.

what constitutes, 226, 228-231.

presumptions, 228-230.

when presumed, 230-239.

from inadequacy of consideration, 237-239.

information to suggest inquiry, 226-228, 230, 231.

degree of diligence required, 230, 231.

from want of possession of instrument, 229.

prima facie or conclusive, 228, 229.

purchase out of usual course of business, 217, 233, 234.

purchase of overdue paper, 160-164, 234, 235.

paper payable at sight or on demand, 235.



[The numbers refer to pages.]

**PURCHASER FOR VALUE WITHOUT NOTICE—Continued.**

- presumption and burden of proof, 239-244.
- consideration, 240-243.
- legality of contract, 241.
- fraud, duress, illegality of consideration, etc., 243.
- title of holder, 241.
- good faith and want of notice, 241.
- order of proof, 239-244.
- rights under indorsement in blank, 95-98.
- defenses against, see "Defenses."

**PURCHASER IN DUE COURSE,**

- see "Purchaser for Value without Notice."

**PURCHASER IN USUAL COURSE OF BUSINESS,**

- see "Purchaser for Value without Notice."

**PURCHASER WITHOUT NOTICE,**

- see "Purchaser for Value without Notice."

**PURPOSE,**

- of negotiable paper, 1.

**Q.**

**QUALIFIED ACCEPTANCE,**

- see "Acceptance."

**QUALIFIED INDORSEMENT,**

- see "Indorsement."

**QUASI INDORSEMENT,**

- see "Indorsement."

**R.**

**RATE,**

- of interest, see "Interest."

**RATIFICATION,**

- of contract voidable for usury, 177.

**REAL DEFENSES,**

- see "Defenses."

**REASONABLE TIME,**

- for presentment, what is, 255-257.

NEG. BILLS—24

[The numbers refer to pages.]

**RECOUPMENT,**

on partial failure of consideration, 198, 199.

**RECOURSE,**

indorsement without, see "Indorsement."

**RE-EXCHANGE,**

see "Exchange."

**RELEASE,**

see "Discharge."

**REMOTE PARTIES,**

to indorsement, who are, 164.

defenses against, see "Defenses."

**RENEWAL,**

contract tainted with usury, 177, 178.

**RESCISSION,**

of acceptance, 57, 58.

**RESTRAINT OF TRADE,**

see "Consideration."

**RESTRICTIVE INDORSEMENT,**

see "Indorsement."

**REVOCATION,**

of acceptance, 57, 58.

**S.**

**SEPARATE PAPER,**

acceptance on, see "Acceptance."

**SEVERAL AND JOINT LIABILITY,**

alteration, 184, 188.

**SICKNESS,**

preventing presentment for payment, 295, 297-300.

**SIGHT,**

use of words "at sight," 30.

**SIGNATURE,**

meaning of term, 42.

place on instrument, 44.

sufficiency, 44.

[The numbers refer to pages.]

**SIGNATURE**—Continued.

- by drawer after acceptance, 83, note.
- of maker or drawer necessary, 42, 46, 47.
  - exceptions to rule, accepted draft, 42, 47, 122-124.
    - name in body of instrument, 43.
    - signing by agent, 43.
    - mark, 43.
    - initials, 43.
    - use of pencil, 43.
    - printing, 43.
- of drawer, warranted by acceptor, 122-124.
- adding or removing, 184, 187, 188.
- forged signature, see "Forgery."

**SPECIAL INDORSEMENT,**

- see "Indorsement."

**SPLITTING,**

- of right of action by indorsement, 110, 111.

**SPOILIATION,**

- alteration of instrument by stranger, 182, 183.

**STEALING,**

- instrument indorsed in blank, 95-98.

**STIPULATIONS,**

- as to fund for payment, 36, 37.

**SUBROGATION,**

- of acceptor *supra* protest to holder's rights, 131.

**SUNDAY,**

- effect in computing days of grace, 63, 64, 271-273.
- violation of Sunday law, see "Consideration."

**SUPRA PROTEST,**

- acceptance, see "Acceptance;" "Acceptor."

**SURETY,**

- see "Principal and Surety."

[The numbers refer to pages.]

## T.

### TENOR OF INSTRUMENT,

- of bill, defined, 74.
- acceptance according to, see "Acceptance."
- indorsement must follow, 110.

### THEFT,

- of instrument indorsed in blank, 95-98.

### THREATS,

- see "Duress."

### TIME,

- of execution, presumption from date, 60.
- of acceptance for honor or supra protest, 88, note.
- of payment, must be certain, 24, 38.
  - certain event at uncertain time, 29, 32, 33.
  - in installments, 30.
  - alteration, effect, 184, 185.
  - change by indorsement, 110.
  - days of grace, see "Days of Grace."
- of presentment for acceptance, see "Presentment."
- for payment, see "Presentment."
- of notice of dishonor, 292-295.

### TITLE,

- warranty by indorser, 137-142.
- presumption from possession, 8, 12, 241, 257, 258.
  - bill payable to bearer or indorsed in blank, 258.
  - bill unindorsed by payee, 258.
  - possession by another than the indorsee, 258.
  - possession by agent, 258.

### TRADE,

- restraint of, see "Consideration."

### TRANSFER,

- defined, 154.
- negotiation distinguished from assignment, 7-13.
- methods, 154-159.



[The numbers refer to pages.]

TRANSFER—Continued.

- by indorsement, 8, 154-157.
  - who must indorse, 156.
    - by payee, 156.
    - by executor of deceased payee, 156.
    - by assignee of bankrupt payee, 156.
    - by executors to whom payable, 156.
    - by husband of payee, 156.
    - by partner, 156.
    - by joint payees, 156.
  - necessity where instrument payable to order, 155.
  - effect of failure to indorse, 155-157.
    - subsequent indorsement, 155-157.
    - equities enforceable against holder, 155-157.
- by assignment, 154-157.
- by delivery without indorsement, 8, 154, 158, 159.
  - proper where payable to bearer, 158.
  - transferor incurs no liability, 158, 159.
- by operation of law, 154, 159.
  - to representative on death of holder, 159.
  - to assignee of bankrupt holder, 159.
  - to husband of holder, 159.
  - to surviving partners, 159.
- of overdue paper, 160-164.
  - may be by indorsement or delivery, 160.
  - is by indorsement, not by assignment, 160, 161.
  - rights of transferee or indorsee, 160-164.
  - liability of accommodation party, 160, 162-164.
- validity between immediate parties, 164-167.
  - who are immediate parties, 164.
  - defenses, 164-167.
- warranty of title, 137-142.
- capacity of parties in general, 52-55.
  - by trustees, 53, 54.
  - by person non compos mentis, 52.
  - by married women, 52.
  - by infants, 52, 108.
  - by guardian, 53, 54.
  - by executor and administrator, 53, 54.

[The numbers refer to pages.]

TRANSFER—Continued.

capacity by corporation acting ultra vires, 52, 108.

by alien enemies, 52.

by agent, 53-55.

rule of caveat emptor not applicable, 12.

the indorsement, see "Indorsement."

consideration, see "Consideration."

effect of usury, see "Usury."

of non-negotiable instruments, see "Assignment."

TRANSFeree,

see "Indorsee;" "Indorsement;" "Purchaser for Value without Notice;" "Transfer."

TRANSFERRER,

by delivery without indorsement, 158, 159.

incurs no liability, 158, 159.

by indorsement, see "Indorser;" "Transfer."

TRUSTEES,

indorsement and transfer by, 53, 54.

U.

UNDUE INFLUENCE,

see "Duress."

USE,

as circulating medium, 1.

illustration, 1, 2.

USUAL COURSE OF BUSINESS,

see "Purchaser for Value without Notice."

USURY,

defined, 173.

what necessary to constitute, 174-177.

must be a lending and borrowing, 174-176.

what constitutes loan, 174, 175, 181.

indorsement not a borrowing, 180, 181.

must be an intention to commit, 174.

how intent shown, 174.

commission to accommodation party, 175, 176.

discount in advance on face value, 176.

compound interest, 176, 177.

[The numbers refer to pages.]

USURY—Continued.

as a defense, 173-181.

estoppel by representations to set up usury, 177.

taint attaches to renewal of usurious contract, 177, 178.

only available to party to contract or privies, 178.

ratification of voidable contract, 177.

action on original consideration, 177, 178.

when available against bona fide holder, 173, 179-181, 245.

discount by indorsee at more than legal rate, effect, 173, 179-181.

estoppel of indorser, 137-142, 180.

V.

VALUABLE CONSIDERATION,

see "Purchaser for Value without Notice."

VALUE RECEIVED,

meaning of words, in note, 61.

in bill before acceptance, 61.

in bill after acceptance, 61.

use or omission of words, 5, 6, 15.

need not be expressed, 61, 62.

VERBAL,

acceptance, see "Acceptance."

evidence, see "Evidence."

indorsement, see "Indorsement."

notice, see "Notice."

VIS MAJOR,

preventing presentment for payment, 295, 297-300.

W.

WAIVER,

of exemptions, effect, 42.

of presentment, see "Presentment."

of notice of dishonor, see "Notice."

of protest, see "Presentment."

WANT,

of consideration, see "Consideration."

[The numbers refer to pages.]

WAR,

excusing presentment and notice of dishonor, 295, 297-300.

WARRANTIES,

by acceptor, 122-128.

defined, 122.

genuineness of drawer's signature, 122-124.

existence of drawer, 122, 124.

capacity of drawer, 122, 125, 126.

drawer's right to draw, 122, 125.

payee's competency to indorse, 122, 126.

accommodation bill, estoppel, 125, 126.

genuineness of payee's indorsement not warranted, 127.

nor genuineness of terms of bill, 127, 128.

by acceptor for honor, same as by acceptor, 129, 131.

by drawer, existence of drawee, 135.

capacity of drawee to accept, 135, 136.

of acceptance, 135.

others same as indorser's, 136.

by indorser, genuineness of bill or note, 137-142.

genuineness of parties, 137-142.

validity of instrument, 137-142.

capacity of prior parties, 137-142.

title and right to transfer, 137-142.

by indorser without recourse, 142, 143.

breach, recovery of consideration, 143-145.

consideration for indorsement necessary, 143-145.

damages recoverable for breach, see "Damages."

WITHOUT DEFALCATION,

use of words, 15.

WITHOUT RECOURSE,

indorsement, see "Indorsement."

WORDS,

of negotiability, 14-17.

see, also, "Definitions."









